No. 2192

IN THE 2192

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

OTTO HOFFMAN,

Defendant in Error,

and

E. J. MORRISON,

Defendant in Error,

and

CLARENCE E. MAXFIELD,

Defendant in Error,

and also

GEORGE F. MOTTET, S. V. DAVIN and XAVIER F. MICHELLOD,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Southern Division.

SHAW & BORDEN CO. 134658

No.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

OTTO HOFFMAN,

Defendant in Error,

and

E. J. MORRISON,

Defendant in Error,

and

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In the District Court of the United States for the Eastern District of Washington.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

OTTO HOFFMAN,

Defendant in Error,

and

E. J. MORRISON,

Defendant in Error,

and

CLARENCE E. MAXFIELD,

Defendant in Error,

and also

GEORGE F. MOTTET, S. V. DAVIN and XAVIER F. MICHELLOD,

Defendants in Error.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

POST, AVERY & HIGGINS, Exchange National Bank Building, Spokane, Washington, and

SHARPSTEIN & SHARPSTEIN, of Walla Walla, Washington,

Attorneys for Plaintiff in Error.

T. P. and C. C. GOSE and W. B. MITTON, of Walla Walla, Washington,

Attorneys for Defendants in Error.

In the Superior Court of the State of Washington, in and for the County of Walla Walla.

E. J. MORRISON,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against said defendant complains and alleges:

I.

That said defendant is a corporation duly organized and existing, and doing business in said state and county, and engaged therein in maintaining and operating telephone lines.

II.

That heretofore the County Commissioners of the County of Walla Walla did fix and establish a certain public highway commonly known as the Walla Walla and Wallula Road, which said highway runs from the city limits of Walla Walla in a westerly direction to the Town of Wallula in the said County of Walla Walla; that said roadway is sixty feet in width and for many years last past has been used by the general public as a public highway; that at a point about one and a quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. R. & N. Railroad Company's railroad.

III.

That heretofore said defendant, without authority and contrary to law, set, fixed and established within the boundaries of said public highway and near the said railroad crossing a telephone pole of about twelve inches in diameter, and attached to said telephone pole a guy wire which extended from said telephone pole out into said highway a distance of about ten feet, at which last named point the said guy wire was buried and fastened into said highway.

IV.

That on the 2nd day of April, 1910, said plaintiff was riding along said highway as a passenger in an automobile and while so riding in said automobile the said automobile ran into and upon said guy-wire and was by reason thereof wrecked and over-turned.

V.

That by reason of the wrecking and over-turning of said automobile, as aforesaid, said plaintiff suffered serious and severe injuries as follows: Left ear cut off; fracture of skull on left side; face bruised and injured; injury to the spine which caused paralysis of the whole body, and plaintiff is now by reason thereof paralyzed on the right side, arm and leg.

VI.

That by reason of said injury plaintiff was caused great pain and suffering and was compelled to remain in the hospital for a period of 21 days and was unable to perform any services or labor for a period of five months.

VII.

That plaintiff is informed and believes, and therefore alleges, that said paralysis, as hereinbefore alleged, is and will be permanent.

VIII.

That plaintiff is of the age of twenty-eight years and was prior to said accident enjoying the best of health.

IX.

That plaintiff has been compelled to incur by reason of said accident physicians' and hospital bills in the sum of Seven Hundred Dollars ($700.00).

X.

That by reason of the said accident plaintiff was injured the said sum of Seven Hundred Dollars ($700.00) and in addition thereto was injured in the sum of Ten Thousand Dollars ($10,000.00).

WHEREFORE, plaintiff prays for judgment in the sum of Ten Thousand Seven Hundred Dollars ($10,700.00) and for costs herein.

(Signed) C. C. GOSE,
(Signed) W. B. MITTON,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, E. J. Morrison, being first duly sworn, on oath say: I am the plaintiff above named; I have read the contents of the foregoing complaint and the same is true as I verily believe.

E. J. MORRISON. his X mark

Subscribed and sworn to before me this 26th day of November, 1910.

(Signed) EDWARD C. MILLS,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

Endorsements: Complaint being part of Transcript on removal from State Court.

Filed January 6, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the Superior Court of the State of Washington, in and for the County of Walla Walla.

OTTO HOFFMAN,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against said defendant complains and alleges:

I.

That said defendant is a corporation duly organized and existing and doing business in said county and state, and engaged therein in maintaining and operating telephone lines.

II.

That heretofore the County Commissioners of the County of Walla Walla did fix and establish a certain public highway, commonly known as the Walla Walla

and Wallula Road, which said highway runs from the city limits of the City of Walla Walla in a westerly direction to the Town of Wallula, in the said County of Walla Walla; that said roadway is sixty feet in width and for many years last past has been used by the general public as a public highway; that at a point about one and one-quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. R. & N. Railroad Company's railroad.

III.

That heretofore said defendant, without authority of law and contrary to law, set, fixed and established within the boundaries of said public highway and near the said railroad crossing a telephone pole of about twelve inches in diameter, and attached to said telephone pole a guy wire which extended from said telephone pole out into said highway a distance of about ten feet, at which last named point the said guy wire was buried and fastened into said highway.

IV.

That on the 2nd day of April, 1910, said plaintiff was riding along said highway as a passenger in an automobile and while so riding in said automobile, the said automobile ran into and upon said guy wire and was, by reason thereof, wrecked and overturned.

V.

That by reason of the wrecking and overturning of said automobile, as aforesaid, said plaintiff suffered serious and severe injuries, as follows: A fracture of the right femur at the upper and middle thirds, and plaintiff suffered such a further injury as to destroy

the sense of hearing in his left ear; that by reason of said fracture the right leg of plaintiff is stiff at the knee and said right leg is also short about four inches; and the right femur bone projects out from its natural position several inches; that said injuries are permanent; that by reason of said injuries plaintiff was, and now is, caused great pain and suffering and was and has been compelled to remain in the hospital for many months, and has been unable to perform any services or labor since the date of said injuries.

VI.

That plaintiff has been compelled to incur by reason of said accident and injuries physicians' and hospital fees in the sum of Eleven Hundred Seventy-eight Dollars ($1178:00).

VII.

That by reason of said accident and injuries plaintiff was injured and damaged in the said sum of Eleven Hundred Seventy-eight Dollars ($1178.00) and in addition thereto was damaged and injured in the sum of Twenty Thousand Dollars ($20,000.00).

WHEREFORE, plaintiff prays for judgment in the sum of Twenty-one Thousand One Hundred Seventy-eight Dollars ($21,178.00) and for his costs herein.

(Signed) C. C. GOSE *and*
W. B. MITTON,
Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah,—ss.

I, Otto Hoffman, being first duly sworn, on oath say: I am the plaintiff above named; I have read the contents of the foregoing complaint and the same is true, as I verily believe.

(Signed) OTTO HOFFMAN.

Subscribed and sworn to before me this 19th day of December, 1910.

(Signed) CHAS. L. URFER,
Notary Public for the State of Oregon, Residing at Portland, Oregon.

Endorsements: Complaint being part of Transcript on removal from State Court.

Filed January 7, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the Superior Court of the State of Washington, in and for the County of Walla Walla.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against said defendant, complains and alleges:

1. That said defendant is a corporation duly organized and existing and doing business in said state and

county, and engaged therein in maintaining and operating telephone lines.

2. That heretofore the County Commissioners of the County of Walla Walla did fix and establish a certain public highway, commonly known as the Walla Walla and Wallula Road, which said highway runs from the city limits of the City of Walla Walla in a westerly direction to the Town of Wallula, in said County of Walla Walla; that said roadway is sixty feet in width and for many years last past has been used by the general public as a public highway; that at a point about one and one-quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. R. & N. Railroad Company's railroad.

3. That heretofore said defendant, without authority of law and contrary to law, set, fixed and established within the boundaries of said public highway and near the said railroad crossing a telephone pole of about twelve inches in diameter, and attached to said telephone pole a guy wire which extended from said telephone pole out into said highway a distance of about ten feet, at which last named point the said guy wire was buried and fastened into said highway.

4. That on the 2nd day of April, 1910, said plaintiff was riding along said highway as a passenger in an automobile and while so riding in said automobile, the said automobile ran into and upon said guy wire and was, by reason thereof, wrecked and overturned.

5. That by reason of the wrecking and overturning of said automobile, as aforesaid, said plaintiff suffered

serious and severe injuries, as follows: Ligaments of three ribs torn and loosened from spine; face cut and bruised and ankle badly sprained, and one tooth knocked out and three other teeth broken; that by reason of said injuries plaintiff was caused great pain and suffering and was thereby prevented from performing any services or labor for a period of five weeks from the date of said injuries.

6. That plaintiff has been compelled to incur by reason of said accident and injuries physician's fees in the sum of Seventy-five Dollars ($75.00).

7. That by reason of said accident and injuries plaintiff was injured and damaged in the said sum of Seventy-five Dollars ($75.00) and in addition thereto was damaged and injured in the sum of Four Thousand Dollars ($4,000.00).

WHEREFORE, plaintiff prays for judgment in the sum of Four Thousand and Seventy-five Dollars ($4,075.00) and for his costs herein.

(Signed) C. C. GOSE *and*
W. B. MITTON,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, Clarence E. Maxfield, being first duly sworn, on oath say: I am the plaintiff above named; I have read the contents of the foregoing complaint and the same is true, as I verily believe.

(Signed) CLARENCE E. MAXFIELD.

Subscribed and sworn to before me this 27th day of December, 1910.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

Endorsements: Complaint being part of Transcript on removal from State Court.

Filed December 9, 1911.

FRANK C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the Superior Court of the State of Washington, in and for the County of Walla Walla.

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

COMPLAINT.

Plaintiffs, for cause of action against said defendant, complain and allege:

1. That on April 1, 1910, plaintiffs were, and ever since said time have been, the owners in common, and each owning an undivided one-third interest in and to a certain 60 horse-power Oldsmobile Automobile, of the value of Four Thousand, Five Hundred Dollars ($4,500.00).

2. That said defendant is a corporation duly organized and existing, and doing business in said state and

county, and engaged therein in maintaining and operating telephone lines.

3. That heretofore the County Commissioners of the County of Walla Walla did fix and establish, and cause to be opened, a certain public highway commonly known as the "Walla Walla and Wallula Road," which said highway runs from the city limits of the City of Walla Walla in a westerly direction to the Town of Wallula in said County of Walla Walla; said roadway is 60 feet in width and for many years next last past has been used by the general public as a public highway; that at a point about one and one-quarter miles west of the City of Walla Walla, the said public highway crosses the railroad track of the O. W. R. & N. Railroad Company's railroad.

4. That heretofore said defendant set, fixed and established near the boundary of said public highway, and near the said railroad crossing, a telephone pole of about 12 inches in diameter, and wrongfully and without authority of law, and contrary to law, attached to said telephone pole a guy wire which extended from said telephone pole out into said highway a distance of about ten feet, at which last named point the said guy wire was buried and fastened into said highway.

5. That prior to the second day of April, 1910, the said plaintiffs, as owners of said automobile, delivered the same to one E. A. Mullinix, to be used by him, the said E. A. Mullinix, in conducting and promoting the business of the Washington Weeder Works, a company in which said plaintiffs were then, and still are, interested as stockholders; that said automobile was deliv-

ered to said E. A. Mullinix for said purpose, and for no other purpose whatever.

6. That the said E. A. Mullinix, without permission or authority from said plaintiffs, or any of them, did on the evening of April 2, 1910, take, use and employ the said automobile in driving a number of his friends in said automobile over and along the said highway, and while so driving the said automobile, the same ran into and upon said guy wire and, by reason thereof, the said automobile was wrecked, overturned, broken and injured, and that by reason thereof said automobile was damaged in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

WHEREFORE, plaintiffs pray for judgment in the sum of $3,500, and for their costs and disbursements herein.

(Signed) W. B. MITTON *and*
C. C. GOSE,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, S. V. Davin, being first duly sworn on oath, say: I am one of the above named plaintiffs; I have read the foregoing complaint and the same is true, as I verily believe.

(Signed) S. V. DAVIN,

Subscribed and sworn to before me this 21st day of October, 1911.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

Endorsements: Complaint being part of Transcript on removal from State Court.

Filed December 9, 1911.

FRANK C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 278.

In the District Court of the United States, Eastern District of Washington, Southern Division.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant and for answer to plaintiff's complaint herein:

I.

Denies each and every allegation and thing contained in that part of paragraph II which reads as follows, to-wit: "That said roadway is sixty feet in width and for many years last past has been used by the general public as a public highway; that at a point about one and one quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. R. & N. Railroad Company's railroad."

II.

Denies each and every allegation and thing contained in paragraph III of said complaint.

III.

Denies any knowledge or information sufficient to form a belief as to each and every allegation and thing contained in paragraphs IV, V, VI and VII in said complaint.

For a further and affirmative answer and defense herein the defendant alleges:

I.

That the defendant was not guilty of any negligence or of any unlawful act or of any unauthorized act or of any omission in or about or in connection with any of the matters alleged in plaintiff's complaint; and alleges that if the plaintiff was injured such injury was not caused by the negligence or wrongful act or any omission on the part of the defendant or any one for whom it is responsible, but was caused and brought about and was owing to the negligence, fault and want of care on the part of the plaintiff.

WHEREFORE, defendant prays judgment that the plaintiff take nothing by virtue of this action, and that the defendant recover its costs herein.

(Signed) SHARPSTEIN & SHARPSTEIN *and*
POST, AVERY & HIGGINS,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, H. J. Tinkham, being first duly sworn, say: That I am District Superintendent of Plant of the Pacific Telephone and Telegraph Company, the defendant

above named; that I know the contents of the foregoing answer and believe the same to be true.

(Signed) H. J. TINKHAM.

Subscribed and sworn to before me this 5th day of June, 1912.

(Signed) J. L. SHARPSTEIN,
Notary Public for Washington.

Endorsements: ANSWER.

Filed June 5, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 279.

In the District Court of the United States, Eastern District of Washington, Southern Division.

GEORGE F. MOTTET, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant and for answer to plaintiffs' complaint herein:

I.

Denies any knowledge or information sufficient to form a belief as to each and every allegation and thing contained in paragraph I in plaintiffs' complaint.

II.

For answer to that portion of paragraph III, which reads as follows: "The said roadway is sixty feet in

width and for many years next last past has been used by the general public as a public highway; that at a point about one and one-quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. W. R. & N. Railroad Company's railroad," the defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof therein contained.

III.

Denies each and every allegation or thing contained in paragraph IV of said complaint.

IV.

Denies any knowledge or information sufficient to form a belief as to each and every allegation and thing contained in paragraphs V and VI in said complaint.

For a further and affirmative answer and defense herein the defendant alleges:

That if the plaintiffs' automobile was injured or damaged in any degree or to any extent that said injury and damage was caused and brought about not by reason of the carelessness or negligence or the fault of this defendant or any one for whom it is responsible, but by reason of the carelessness and negligence and fault of the persons running and occupying said automobile at the time of the alleged accident thereto.

WHEREFORE, defendant prays judgment that the plaintiffs take nothing by virtue of this action, and that the defendant recover its costs herein.

(Signed) POST, AVERY & HIGGINS *and*
SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, H. J. Tinkham, being first duly sworn, say: That I am District Superintendent of Plant of the Pacific Telephone and Telegraph Company, the defendant above named; that I know the contents of the foregoing answer and believe the same to be true.

(Signed) H. J. TINKHAM.

Subscribed and sworn to before me this 5th day of June, 1912.

(Signed) J. L. SHARPSTEIN,
Notary Public for Washington.

Endorsements: ANSWER.
Filed June 5, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the United States Circuit Court for the Ninth Circuit,
Eastern District of Washington,
Southern Division.

E. J. MORRISON,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ANSWER.

Now comes the defendant above named, and answers the complaint of plaintiff herein as follows:

I.

For answer to all that portion of paragraph II of

said complaint, which reads as follows, to-wit: "That said roadway is sixty feet in width and for many years last past has been used by the general public as a public highway; that at a point about one and a quarter miles west of the City of Walla Walla the said public highway crosses the railroad track of the O. R. & N. Railroad Company's railroad," defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof therein contained.

II.

Defendant denies each and every allegation contained in the 3rd paragraph or sub-division of plaintiff's complaint.

III.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 4th paragraph or sub-division of plaintiff's complaint.

IV.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 5th paragraph or sub-division of plaintiff's complaint.

V.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 6th paragraph or sub-division of plaintiff's complaint.

VI.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any

thereof contained in the 7th paragraph or sub-division of plaintiff's complaint.

VII.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 8th paragraph or sub-division of plaintiff's complaint.

VIII.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 9th paragraph or sub-division of plaintiff's complaint.

IX.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 10th paragraph or sub-division of plaintiff's complaint.

Defendant for a further and separate answer and defense herein, alleges:

That the defendant was not guilty of any negligence or of any unlawful act or of any unauthorized act in or about or in connection with any of the matters alleged in plaintiff's complaint, and alleges that if the plaintiff was injured such injury was not caused by any negligence or wrongful act on the part of the defendant, its servants or agents, but was owing to the negligence, fault and want of care on the part of the plaintiff himself.

WHEREFORE, defendant prays judgment that the plaintiff take nothing by virtue of this action, and that defendant recover its costs herein.

(Signed) POST, AVERY & HIGGINS *and*
SHARPSTEIN & SHARPSTEIN,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, F. B. Sharpstein, being duly sworn, say: That I am one of the attorneys for the defendant in the above entitled action; that I have read the foregoing answer, know the contents thereof, and believe the same to be true; that I make this verification in behalf of the defendant for the reason that said defendant is a non-resident corporation of the State of Washington, and has no officer within the County of Walla Walla who can make this verification.

(Signed) F. B. SHARPSTEIN.

Subscribed and sworn to before me this 31st day of March, 1911.

(Signed) J. L. SHARPSTEIN,
Notary Public for Washington.

Endorsements: Served by copy April 1, 1911.
(Signed) C. C. GOSE,
of Plaintiff's Attorneys.

ANSWER.

Filed October 9, 1911.
F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the United States Circuit Court for the Ninth Circuit,
Eastern District of Washington,
Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ANSWER.

Now comes the defendant above named, and answers the complaint of plaintiff herein as follows:

I.

For answer to all that portion of paragraph II of said complaint, which reads as follows, to-wit: "That said roadway is 60 feet in width, and for many years last past has been used by the general public as a highway; that at a point about one and one-quarter miles west of the City of Walla Walla the said public highway crossed the railroad track of the O. R. & N. Railroad Company's railroad," defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof therein contained.

II.

Defendant denies each and every allegation contained in the 3rd paragraph or sub-division of plaintiff's complaint.

III.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any

thereof contained in the 4th paragraph or sub-division of plaintiff's complaint.

IV.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 5th paragraph or sub-division of plaintiff's complaint.

V.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 6th paragraph or sub-division of plaintiff's complaint.

VI.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations or any thereof contained in the 7th paragraph or sub-division of plaintiff's complaint.

Defendant for a further and separate answer and defense herein, alleges:

That the defendant was not guilty of any negligence or of any unlawful act or of any unauthorized act in or about or in connection with any of the matters alleged in plaintiff's complaint, and alleges that if the plaintiff was injured such injury was not caused by any negligence or wrongful act on the part of the defendant, its servants or agents, but was owing to the negligence, fault and want of care on the part of the plaintiff himself.

WHEREFORE, defendant prays judgment that the

plaintiff take nothing by virtue of this action, and that defendant recover its costs herein.

(Signed) POST, AVERY & HIGGINS *and*
SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, F. B. Sharpstein, being duly sworn, say: That I am one of the attorneys for the defendant in the above entitled action; that I have read the foregoing answer, know the contents thereof, and believe the same to be true; that I make this verification in behalf of the defendant for the reason that said defendant is a non-resident corporation of the State of Washington, and has no officer within the County of Walla Walla who can make this verification.

(Signed) F. B. SHARPSTEIN.

Subscribed and sworn to before me this 31st day of March, 1911.

(Signed) J. L. SHARPSTEIN,
Notary Public for Washington.

Endorsements: Served by copy April 1, 1911.
(Signed) C. C. GOSE,
of Plaintiff's Attorneys.

ANSWER.

Filed October 9, 1911.
F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 271.

In the United States Circuit Court for the Ninth Circuit, Eastern District of Washington, Southern Division.

E. J. MORRISON,

Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

REPLY.

Now comes the above named plaintiff, and replies to the further and separate answer and defense of defendant herein, as follows:

I.

Plaintiff denies each and every allegation, matter and thing contained in the further and separate answer and defense of defendant herein.

WHEREFORE, plaintiff reiterates the prayer of his complaint.

(Signed) T. P. and C. C. GOSE, *and*
W. B. MITTON,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, E. J. Morrison, being first duly sworn on oath, say: I am the plaintiff above named. I have read the foregoing reply, and the same is true, as I verily believe.

(Signed) E. J. MORRISON.

Subscribed and sworn to before me this 15th day of May, 1911.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

(Notarial Seal.)

Endorsements: Due and sufficient service of the foregoing reply is hereby admitted this 15th day of May, 1911.

(Signed) SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

REPLY.

Filed May 29, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 272.

In the United States Circuit Court for the Ninth Circuit, Eastern District of Washington, Southern Division.

OTTO HOFFMAN,
Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

REPLY.

Now comes the above named plaintiff, and replies to the further and separate answer and defense of defendant herein, as follows:

I.

Plaintiff denies each and every allegation, matter and thing contained in the further and separate answer and defense of defendant herein.

WHEREFORE, plaintiff reiterates the prayer of his complaint.

(Signed) T. P. and C. C. GOSE *and*
W. B. MITTON,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, W. B. Mitton, being first duly sworn on oath, say: I am one of the attorneys for plaintiff in the within action; I have read the foregoing reply, and the same is true, as I verily believe; I make this verification in plaintiff's behalf for the reason that said plaintiff is a non-resident of the County of Walla Walla, State of Washington.

(Signed) W. B. MITTON.

Subscribed and sworn to before me this 15th day of May, 1911.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

(Notarial Seal.)

Endorsements: Due and sufficient service of the foregoing reply is hereby admitted this 15th day of May, 1911.

(Signed) SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

REPLY.

Filed May 29, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 278.

In the United States Circuit Court for the Ninth Circuit, Eastern District of Washington, Southern Division.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

REPLY.

Now comes the above named plaintiff, and replies to the further and separate answer and defense of defendant herein, as follows:

I.

Plaintiff denies each and every allegation, matter and thing contained in the further and separate answer and defense of defendant herein.

WHEREFORE, plaintiff reiterates the prayer of his complaint.

(Signed) T. P. and C. C. GOSE *and*
W. B. MITTON,

Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, Clarence E. Maxfield, being first duly sworn, on oath say: I am the plaintiff above named; I have read the foregoing reply, and the same is true, as I verily believe.

(Signed) CLARENCE E. MAXFIELD.

Subscribed and sworn to before me this 15th day of May, 1911.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

(Notarial Seal.)

Endorsements: Due and sufficient service of the foregoing reply is hereby admitted this 15th day of May, 1911.

(Signed) SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

REPLY.

Filed May 29, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 279.

In the United States Circuit Court for the Ninth Circuit, Eastern District of Washington, Southern Division.

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

REPLY.

Now come the above named plaintiffs, and reply to the further and separate answer and defense of defendant herein, as follows:

I.

Plaintiffs deny each and every allegation, matter and thing contained in the further and separate answer and defense of defendant herein.

WHEREFORE, plaintiffs reiterate the prayer of their complaint.

(Signed) T. P. and C. C. GOSE, *and*
W. B. MITTON,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Walla Walla,—ss.

I, S. V. Davin, being first duly sworn, on oath say: I am one of the above named plaintiffs; I have read the foregoing reply, and the same is true, as I verily believe.

(Signed) S. V. DAVIN.

Subscribed and sworn to before me this 15th day of May, 1911.

(Signed) T. P. GOSE,
Notary Public for the State of Washington,
Residing at Walla Walla, Washington.

(Notarial Seal.)

Endorsements: Due and sufficient service of the foregoing reply is hereby admitted this 15th day of May, 1911.

(Signed) SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

REPLY.

Filed May 29, 1911.

F. C. NASH, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And also

GEORGE F. MOTTETT, S. V. DAVIN, and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

It is hereby stipulated and agreed by and between the parties hereto that the above causes may be and they are consolidated for all purposes hereafter and hereto-

fore, including the prosecution of an appeal or writ of error to the Circuit Court of Appeals, and all proceedings shall be as in one case but the consolidated title as hereinabove shall be used. Nothing herein, however, shall be understood as precluding the right of the above or any other court to make any order or judgment herein which shall apply to any one or more of the different cases consolidated and not to all of them and if thought proper an order to that effect may be entered herein.

(Signed) C. C. GOSE,
Attorney for Plaintiff.

(Signed) SHARPSTEIN & SHARPSTEIN, *and*
POST, AVERY & HIGGINS,
Attorneys for Defendant.

Endorsements: Stipulation consolidating cases.
Filed July 16, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 271.

In the District Court of the United States, Eastern District of Washington, Southern Division.

E. J. MORRISON,
Plaintiff,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and assess the amount of damages at Five Thousand ($5,000.00) Dollars.

(Signed) W. L. DARBY,
Foreman.

Endorsements: VERDICT.
Filed June 6, 1912.

W. H. HARE, *Clerk.*

No. 272.

In the District Court of the United States, Eastern District of Washington, Southern Division.

OTTO HOFFMAN,
Plaintiff.

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and assess the amount of damages at Six Thousand ($6,000.00) Dollars.

(Signed) W. L. DARBY,
Foreman.

Endorsements: VERDICT.
Filed June 6, 1912.

W. H. HARE, *Clerk.*

No. 278.

In the District Court of the United States, Eastern District of Washington, Southern Division.

CLARENCE E. MAXFIELD,

Plaintiff.

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and assess the amount of damages at Eight Hundred ($800.00) Dollars.

(Signed) W. L. DARBY,

Foreman.

Endorsements: VERDICT.

Filed June 6, 1912.

W. H. HARE, *Clerk.*

No. 279.

In the District Court of the United States, Eastern District of Washington, Southern Division.

GEORGE F. MOTTET, *et al.*,

Plaintiffs,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the

plaintiffs and assess the amount of damages at Five Hundred ($500.00) Dollars.

(Signed) W. L. DARBY,
Foreman.

Endorsements: VERDICT.
Filed June 6, 1912.
W. H. HARE, *Clerk.*

No. 271.

In the District Court of the United States, Eastern District of Washington, Southern Division.

E. J. MORRISON,
Plaintiff.

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

JUDGMENT.

This matter coming on regularly to be heard by the court on the verdict of the jury heretofore rendered in said case, awarding to plaintiff damages in the sum of Five Thousand Dollars ($5,000.00), it is hereby CONSIDERED, ORDERED and ADJUDGED by the court that said plaintiff have and recover judgment against said defendant for the sum of Five Thousand Dollars ($5,000.00), and costs amounting to the sum of $..... to be taxed.

Dated this 7th day of June, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: JUDGMENT.
Filed June 7, 1912.
W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

No. 272.

In the District Court of the United States, Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff.

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

JUDGMENT.

This matter coming on regularly to be heard by the court on the verdict of the jury heretofore rendered in said cause awarding to plaintiff damages in the sum of $6,000.00, it is hereby CONSIDERED, ORDERED and ADJUDGED by the court that said plaintiff do have and recover judgment against said defendant for the sum of $6,000.00 and costs amounting to the sum of $..... to be taxed.

Dated this 7th day of June, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: JUDGMENT.

Filed June 7, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

No. 278.

In the District Court of the United States, Eastern District of Washington, Southern Division.

CLARENCE E. MAXFIELD,

Plaintiff.

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

JUDGMENT.

This matter coming on regularly to be heard by the court on the verdict of the jury heretofore rendered in said case awarding to plaintiff damages in the sum of $800.00, it is hereby CONSIDERED, ORDERED and ADJUDGED by the court that said plaintiff do have and recover judgment against said defendant for the sum of $800.00 and costs amounting to the sum of $..... to be taxed.

Dated this 7th day of June, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: JUDGMENT.

Filed June 7, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

No. 279.

In the District Court of the United States, Eastern District of Washington, Southern Division.

GEORGE F. MOTTET, S. V. DAVIN, XAVIER F. MICHELLOD,

Plaintiffs,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

JUDGMENT.

This matter coming on regularly to be heard by the court on the verdict of the jury heretofore rendered in said case awarding to plaintiffs damages in the sum of $500.00, it is hereby CONSIDERED, ORDERED and ADJUDGED by the court that said plaintiffs do have and recover judgment against said defendant for the sum of $500.00 and costs amounting to the sum of $..... to be taxed.

Dated this 7th day of June, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: JUDGMENT.

Filed June 7, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

In the District Court of the United States, Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff.

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant,

and

E. J. MORRISON,

Plaintiff.

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant,

and

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant,

and also

GEORGE F. MOTTET, S. V. DAVIN, and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Comes now the defendant and moves the court for a judgment herein notwithstanding the verdict, on the ground and for the reasons:

1. That there was no evidence or testimony adduced in the plaintiff's case which was sufficient to warrant a jury in finding a verdict in favor of the plaintiff.

2. That there was no testimony or evidence adduced on the part of the defendant which would warrant the jury in finding a verdict in favor of the plaintiff.

3. That there was no evidence or testimony adduced in the whole case which warranted the jury in finding a verdict for the plaintiff.

4. That the evidence and testimony adduced by the parties hereto at the trial of said cause show that the defendant is and was, as a matter of law, entitled to a verdict.

5. That plaintiff was guilty of contributory negligence.

This motion is made and based on the files, records and pleadings herein and upon the minutes of the court, all notes, memoranda made at the trial of said cause, including the reporter's transcript and shorthand notes, and upon all of the matters and things and proceedings occurring or taking place at the trial of said cause.

(Signed) POST, AVERY & HIGGINS *and*
SHARPSTEIN & SHARPSTEIN,
Attorneys for Defendant.

Endorsements: Service by copy this 14th day of June, 1912.

(Signed) C. C. GOSE,
of Counsel for Plaintiffs.

Motion for judgment notwithstanding verdict.
Filed June 14, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And also

GEORGE F. MOTTET, S. V. DAVIN, and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

ORDER PERMITTING MOTION FOR NEW TRIAL, NOTWITHSTANDING NO DECISION ON MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

WHEREAS, it may not be possible, within the time allowed by the rules of this court, to hear and decide the defendant's motion for a judgment notwithstanding the verdict before the expiration of the time for serving the motion for a new trial on the part of the defendant in event said motion for judgment notwithstanding the verdict is denied; and Whereas the defendant desires to file such motion for a new trial in the event of an adverse decision on said motion for judgment notwithstanding the verdict; and Whereas the rights and interests of all parties will be preserved in any event if said motion for a new trial is filed before the decision on said motion for a judgment notwithstanding the verdict and stand subject to the decision on said last described motion; Now, therefore, on the application of the defendant,

IT IS ORDERED that the defendant may, at any time within the period allowed by the rules of the court for the filing and serving of a motion for new trial, file and serve said motion notwithstanding the fact that the motion for a judgment notwithstanding the verdict has not been decided, and said motion for a new trial shall stand subject to said motion for a judgment notwithstanding the verdict; that the filing of said motion for a new trial shall not be deemed or considered as a waiver on the part of the defendant of its said motion for a judgment notwithstanding the verdict, and in event said last named motion is denied, then said defendant's motion for a new trial will be heard, considered and decided by the court and only in event said motion for a judgment notwithstanding the verdict is granted shall said motion for new trial be not considered.

Done in open court this 15th day of July, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order permitting motion for new trial, notwithstanding no decision on motion for judgment.

Filed July 16, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And also

GEORGE F. MOTTETT, S. V. DAVIN, and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

MOTION FOR NEW TRIAL.

Comes now the defendant and moves the court herein (if the motion for judgment notwithstanding the verdict is denied herein), for an order granting a new trial for the following causes, each of which materially affects the substantial rights of the defendant:

1. Orders of the court by which the defendant was prevented from having a fair trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict; that is to say, there was not, as a matter of law, sufficient evidence to permit the jury to say that the defendant was guilty of negligence or that the occupation of the road involved in the action by the defendant with its pole and guy wire was not authorized by law, and the evidence did show, as a matter of law, that the occupancy of said road by the defendant with the pole and guy wire involved was authorized by law and lawful; that the acceptance by the defendant of the rights conferred by the Federal Statutes, as set forth on pages 197-200 of the Bill of Exceptions, and the laws of the State of Washington in respect thereto and the permission of the County Commissioners to maintain said pole

and guy wire as and where maintained at the time of the accident, show as a matter of law that the maintenance of said pole and guy wire was not a nuisance; that it was authorized by law and custom, and that said defendants had a full and perfect right to so maintain said pole and guy wire at the time of the accident referred to in the complaints. That, as to each and every of said plaintiffs the evidence shows that they were guilty of contributory negligence at the time of the accident referred to in the complaints even if there was negligence of any kind or character on the part of the defendant, and the evidence further shows that whatever damages were sustained by any of the plaintiffs herein was not because of the maintenance of the pole or guy wire or because the automobile involved ran into and collided with the O. R. & N. Railway track, and there is not sufficient evidence that the guy wire or the defendant was responsible for or brought about said damages. That all the evidence taken together was insufficient in each case to warrant a verdict against the defendant.

4. Error in law occurring at the trial:

(1) The court erred in permitting Witness Mottett, over defendant's objection, to testify what the automobile then referred to cost him. (B. of E., p. 129.)

(2) The court erred in permitting Witness Mottett, over defendant's objection, to answer the following question, "What is the retail market value of a machine of that kind at that time?" (B. of E., pp. 129-130.)

(3) The court erred in permitting Witness Wake to testify as to the cost of the material used in repairing the automobile there referred to. (B. of E., pp. 138-9.)

(4) The court erred in permitting Witness Wake to testify as to the difference of value before and after the accident of the automobile there referred to. (B. of E., p. 140.)

(5) The court erred in refusing to permit the defendant Bacon to answer the following question: "This accident happened, I believe, on the 2nd day of April, 1910; taking that date and going back until the time you first had anything to do with it, did the County Commissioners make any request or desire or anything that this—indicate any desire that that line be—in that neighborhood—that guy wire or anything else should be changed?" (B. of E., p. 202.)

(6) The court erred in refusing to permit the defendant to prove that "during all the period prior to the accident, since the building of the defendant's telegraph and telephone line, and since the existence of the guy wire involved, that the County Commissioners of Walla Walla County had not objected and that they had acquiesced in the use of the road at the point of the accident in the manner that it was used and occupied by the defendant with the pole and guy wire directly involved in this case." (B. of E., p. 202.)

(7) The court erred in refusing to sustain the defendant's challange to the sufficiency of the plaintiffs' evidence and motion for a judgment at the end of plaintiffs' case. (B. of E., p. 152.)

(8) The court erred in refusing to sustain the defendant's challenge to the sufficiency of the evidence on the whole case and motion for a judgment for the defendant at the close of the whole case. (B. of E., p. 218.)

(9) The court erred in refusing to give defendant's proposed instructions numbered 1, 2, 4, 5, 6, 7, 8, 11, 12, 13 and 14.

(10) The court erred in giving the instructions contained in the following paragraphs of the charge to the jury: Paragraphs 8, 9, 10, 11, 12, 18, 22 and 23.

(Signed) SHARPSTEIN & SHARPSTEIN *and*
POST, AVERY & HIGGINS,
Attorneys for Defendant.

Endorsements: Personal service of the within motion for a new trial is hereby admitted, at Walla Walla, Washington, this 16th day of July, 1912.

(Signed) C. C. GOSE,
of Attorneys for Plaintiffs.

MOTION FOR A NEW TRIAL.

Filed July 16, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. .....

OTTO HOFFMAN,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

No. .....

E. J. MORRISON,
Plaintiff,
vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

GEORGE F. MOTTETT, S. V. DAVIN, and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

W. B. MITTEN, *and*
C. C. GOSE,

For Plaintiffs,

POST, AVERY & HIGGINS, *and*
SHARPSTEIN & SHARPSTEIN,

For Defendant.

RUDKIN, *District Judge.*

OPINION.

An automobile driven along one of the public highways of Walla Walla County collided with a guy wire attached to one of the telephone poles of the defendant company and anchored within the limits of the roadway, resulting in the wrecking of the car and serious

personal injury to the occupants. The present actions were thereafter instituted to recover damages for the injuries caused by the collision. The three first cases are by occupants of the car to recover for personal injuries, while the fourth is by the owners of the automobile to recover damages for injuries to the car itself. By stipulation of the parties, the four actions were tried before the same jury, but a separate verdict was returned and a separate judgment entered in each case. The jury returned verdicts in favor of the several plaintiffs, and the defendant has interposed a motion for a new trial, accompanied by a motion for judgments in its favor, notwithstanding the verdicts to the contrary. The material facts are substantially as follows:

The Walla Walla and Wallula road intersects the Oregon-Washington Railroad & Navigation Company's track about a mile west of the City of Walla Walla. The road at that point is sixty feet in width, and while a person might travel in safety over every part of the road between the fences, public travel was confined to the macadamized portion, which was eighteen feet in width, or at most to the macadamized part and a couple of feet on either side. The guy wire in question was anchored to a short post in the roadway about two and one-half feet from the line of public travel. The telephone pole to which the guy wire was attached was planted near the margin of the sixty foot roadway and about nine feet from the anchor post. It will thus be seen that the macadamized portion of the road was nearly, if not wholly, on one side

of the center line of the roadway. The road was so constructed, perhaps, to lessen the curvature at the railway crossing where there is a slight bend in the road, but there is no evidence to that effect. At the crossing the railroad was planked for a distance of twenty-four feet between the rails. The crossing was but a short distance from the guy wire. About 9 o'clock on the evening of April 2, 1910, the plaintiffs in the three first mentioned actions, accompanied by two other persons, one of whom was the chauffeur or driver of the car, were driving along the highway in question toward the City of Walla Walla at a high rate of speed. The night was rainy, and as the car approached the railway crossing the left wheels were a short distance off the beaten track and so continued for a distance of about one hundred yards until the crossing was reached. Witnesses who examined the tracks on the following morning expressed the opinion that by reason of the condition of the road, or for some other cause, the car did not readily yield to the steering gear. The left wheels of the car missed the planking between the rails, and one or both of them struck and splintered a tie some distance beyond the end of the planking. The car passed over the track, however, and was again turning towards the macadamized portion of the road when it came in contact with the guy wire, causing the injuries complained of. The telephone line and guy wire were constructed many years ago under a legislative act of 1890, which authorized telephone or telegraph corporations to construct and maintain their lines and poles along and upon public

roads in such manner and at such points as not to incommode the public use of the highway.

2 *Rem. & Bal. Code,* Sec. 9314.

Two points have been urged in support of the motion for a new trial.

First. Error of the court in excluding testimony tending to show that the officers of Walla Walla county were aware of the location and existence of the guy wire in question prior to the happening of the accident complained of, and, second, insufficiency of the evidence to justify the verdict. The latter, of course, is the sole ground of the motion for judgment notwithstanding the verdict.

If the board of county commissioners of Walla Walla county were by law authorized to direct and superintend the placing of poles and guy wires in the public highways of the county, the fact that it had authorized the placing of the guy wire at this particular point, or had acquiesced in the act of the telephone company in placing it there, might be proper for the consideration of the jury, but the command of the statute is directed to the telephone company itself, and it must at its peril keep within the terms of the grant.

Little v. Central District & Printing Telegraph Co., 62 Atl. 648.

Alice, Wade City & C. C. Telephone Co. v. Billingsley, 77 S. W. 255.

Knowledge on the part of the county commissioners that the guy wire was placed in the highway would either tend to show that the board neglected its duty in permitting an obstruction to be placed in a public

highway, or was of the opinion that the obstruction did not incommode the public use of the highway. A showing of neglect of duty on the part of the board would not be material, because it would only tend to show liability on the part of the county, which was not a party to the action, and the opinion of the commissioners that the obstruction did not incommode the public use of the highway was no more competent to go before the jury than the opinion of any other witness to the same effect.

For the purposes of this case it may be conceded that the driver of the car was guilty of such negligence as would preclude a recovery on his part, but it is not claimed that his negligence can be imputed to either the owners or occupants of the car, as matter of law, nor is it claimed, as matter of law, that the owners or occupants of the car were guilty of independent acts of negligence which contributed to the injuries complained of. The sole question, therefore, bearing on the sufficiency of the evidence to sustain the verdicts is the single one, did the guy wire in question incommode the public use of the highway and was that the proximate cause of the accident. Undoubtedly some objects may be placed within the limits of a public street or highway without creating a public nuisance, such as telephone poles, hitching posts, awning posts and stepping stones.

Wolff v. District of Columbia, 196 U. S. 152.

The telephone pole located near the property line in this case was of that character, but can the same be said as a matter of law of the guy wire, extending so close to the line of public travel?

"Whether the defendant was guilty of negligence in failing to maintain its poles in a safe condition under all the circumstances was a question of fact for the jury. The question of negligence must be submitted to the jury as one of fact, not only where there is room for differences of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might be drawn from conceded facts."

Pacific Tel. & Tel. Co. v. Parmenter, 170 Fed. 140.

Each of the twelve jurors in this case was as competent to judge whether the guy wire in question was so located as to incommode the public use of the highway as is this court, and while I would not hesitate to set the verdicts aside, if convinced that they were without support in the testimony, I am not so convinced. There was little or no conflict in the testimony and whether the guy wire incommoded public travel and whether it was the proximate cause of the injury are questions upon which reasonable minds might well differ. The following cases, cited by counsel for the respective parties, have an indirect bearing upon the question here discussed.

Little v. Central District & Printing Telegraph Co., and Alice, Wade City & C. C. Telephone Co. v. Billingsley, supra.

Wolff v. Erie Tel. & Tel. Co., 33 Fed. 320.

Sheffield v. Central Union Telegraph Co., 36 Fed. 164.

Wilson v. Great Southern Telephone Co., 6 So. 781.

Enslew v. New Orleans R. Co., 21 So. 153.
South Texas Tel. Co. v. Tabb, 114 S. W. 448.
Davidson v. Utah Ind. Tel. Co., 97 Pac. 124.
Pacific Tel. & Tel. Co., supra.
Bailey v. Bell Telephone Co., 131 N. Y. Supp. 1000.
Jackson-Hazard Telephone Co. v. Holliday, 136 S. W. 135.
Roberts v. Wisconsin Telephone Co., 77 Wis. 589.

The motion for a new trial and the motion for judgment notwithstanding the verdict are denied.

Endorsements: Opinion denying motion for new trial and motion for judgment notwithstanding verdict.

Filed August 28, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. .....

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ORDER.

The above-entitled consolidated causes having heretofore come on regularly for hearing on the defendant's motion for a judgment notwithstanding the verdict, and the court having heard the arguments of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED, that said motion be and the same is hereby denied.

To the foregoing ruling the defendant excepts and an exception is allowed.

Done in open court this 28th day of August, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order denying motion for judgment notwithstanding the verdict.

Filed August 29, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. .....

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. .....

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ORDER.

The motion of the defendant in the above-entitled consolidated actions for a judgment notwithstanding the verdict having been denied herein, the said consolidated actions came on regularly for hearing on the defendant's motion for a new trial; and the court after hearing said motion and the arguments of counsel, and being fully advised in the premises, believes that said motion should be denied, therefore,

IT IS ORDERED, that said motion for a new trial be and the same is hereby denied, to which ruling the defendant excepts and the exception is allowed.

Done in open court this 28th day of August, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order denying motion for new trial. Filed August 29, 1912.

W. H. HARE, *Clerk.*
By E. E. WRIGHT, *Deputy.*

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 278.

CLARENCE E. MAXFIELD,
Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,
Defendant.

No. 279.

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER E. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

No. 272.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

No. 271.

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

ORDER.

The parties hereto having consented and stipulated that this order be made and it seems right, proper and necessary, it is hereby

ORDERED that the time for filing and serving a Bill of Exceptions in said above consolidated actions shall be and the same is hereby extended up to and including July 6, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order extending time for filing Bill of Exceptions until July 6, 1912.

Filed June 26, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

No. 272.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. 271.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. 278.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

No. 279.

And also

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ORDER.

It having been made to appear to the court that the defendant will not have time to prepare, file and serve a Bill of Exceptions in the above entitled cause within the time heretofore allowed by the court, to-wit: July 6th, 1912, and it further appearing that it is proper and necessary to extend the time for so doing, NOW THEREFORE, on the application of the defendant's attorneys,

It is hereby ORDERED that the time within which the defendant may prepare and serve upon the adverse parties a proposed Bill of Exceptions herein is hereby extended to and including the 26th day of July, 1912, and the order hereinbefore made extending the time for so doing is so amended.

Done this 6th day of July, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order extending time to file Bill of Exceptions until July 26, 1912.

Filed July 8, 1912.

W. H. HARE, *Clerk.*

By E. E. WRIGHT, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And also

GEOFGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled actions came on regularly for trial upon the calendar of said court on the 5th day of June, 1912, before the Hon. Frank H. Rudkin, District Judge, sitting in and holding the above entitled District Court, C. C. Gose, Esq., and W. B. Mitton, Esq., appearing as attorneys for the plaintiffs, and John Sharpstein, Esq., of Sharpstein & Sharpstein, and A. G. Avery, Esq., of Post, Avery & Higgins, appearing as attorneys for the defendant;

Thereupon it was duly stipulated and agreed by and between the parties and their attorneys in open court that inasmuch as the facts were alike in each of said cases, and that the only difference therein was the plaintiffs and the alleged injuries by them sustained, that said actions should be consolidated and tried as one action, and all things pertaining thereunto should be done as in one case, except that the verdicts and judgments entered thereon should be several and separate, and that in prosecuting a writ of error or other proceedings, that the cases should continue as consolidated.

Thereupon a jury was duly impanneled and sworn to try said cause, whereupon the following proceedings were had, to-wit:

The plaintiffs introduced competent evidence tending to show that the plaintiffs Hoffman, Morrison and Maxfield were invited to and did take an automobile ride on the evening of April 2, 1910, in Walla Walla, Washington, by E. A. Mollineux, who drove an automobile owned by plaintiffs Mottett, Davin and Michellod; that

(Testimony of Stanley E. Dean)

plaintiff Hoffman sat in the front seat beside Mollineux, the driver, and the others sitting in the rear of the machine; that they rode out over what is known as the Wallula Road, running west from Walla Walla, for a distance of approximately.....miles twice and on returning the second time, after crossing the O. R. & N. track more or less to the left of the traveled roadway and crossing, the automobile came in contact with a guy wire which supported or helped to support a telegraph and telephone pole belonging to the defendant and used on its telegraph and telephone lines; that said guy wire was less than one-half inch in diameter and was broken by the contact; that said automobile stopped crosswise of the road 20 to 22 feet east of said guy wire with its front from three to six feet from the north line of said road and said plaintiffs were thrown from said automobile to the ground at some point east of said railroad crossing, and with said automobile, respectively, sustained injuries. The defendant contended, among other things, that crossing the railroad track as it was crossed by the automobile was the cause of the accident, and the plaintiffs contended that it was brought about because of the automobile striking said guy wire. That the following testimony is a portion of that adduced by the respective parties:

STANLEY E. DEAN, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

(Testimony of Stanley E. Dean)

DIRECT EXAMINATION.

By Mr. GOSE:

Q. What is your name?

A. Stanley E. Dean.

Q. In what business are you engaged?

A. Preparing abstracts of title to lands in Walla Walla county.

Q. Did you prepare the map which you hold in your hand?

A. Yes, sir.

Q. What does that map portray?

A. The location of the county road and the sections lines which it crosses and also on the road as it was originally laid out, that part of the Walla Walla county down near the Garrison here near which this accident occurred.

A. Which lines represent the actual graded and traveled roadway at the present time?

A. The black lines.

Mr. SHARPSTEIN: I think in order that this testimony may be competent, we should have the same stipulation that we had in the matter before. Mr. Dean in testifying, as we all know, is not producing the original records or using the best evidence; he is simply testifying from an examination of the records and his survey made upon the ground. We want the testimony to be legal and regular in all respects, and we want to make the same stipulation that we made before that it will appear to be so, that is, that Mr. Dean may testify as to all facts which he has ascertained from an examination of the records of the county, in the county com-

(Testimony of Stanley E. Dean)

missioner's office or the county clerk's office, or as they appear in his abstract office, with the same force and effect as though the original records were produced, and as to all figures and measurements made by him upon the grounds, if any, to correspond with them, so that his figures may appear in this case and the testimony may be legal, otherwise we would be in the position of permitting incompetent evidence to go into the case, so that we want the stipulation from the other side saying that that is the way it goes in.

The COURT: You have no objection, Mr. Gose?

Mr. GOSE: No, that is what I understood would be.

The COURT: Yes.

Mr. GOSE: Q. The black line on the southerly side of the road and the black line on the northerly side of the road are the road limits?

A. The road limits as now traveled.

Q. Just show the jury exactly what you are testifying about, Mr. Dean, so that they will understand that fully. There cannot be any objection as long as it is understood that it is in conformity with that.

A. This solid black line and this broken black line indicates the road as it is now traveled and graded. These three red lines indicate the north, the center and the south line of the road as it was laid out according to the field notes in the county surveyor's office. It was laid out that way and has been graded and traveled according to these black lines.

Q. What is the actual grade of the road on the north line of the road, where does the grade line follow, Mr.

(Testimony of Stanley E. Dean)

Dean, as it appears on that roadway in conformity with that map at the present time?

A. It follows the fences there.

Q. And the fence follows the dotted line on the north?

A. Yes, sir.

Q. So that the road is actually graded up to the northerly line that you pointed out as the black line, being the northerly limit of the roadway?

A. Well, what do you mean by graded? It is open to traffic.

Mr. AVERY: That is it exactly.

A. That is what I really meant when I used the statement before.

Mr. AVERY: That is what I thought you meant, Mr. Dean.

Mr. GOSE: Q. Well, you mean by graded that it actually shows marked evidences of having been graded to the full width of the road?

A. Yes, it shows that at one time a ditch was run along there close to that fence or right at it. It is now grown over with weeds.

Q. Near the fence line?

A. Yes.

Q. But it is within the grade area?

A. It is within the—yes, it is what could be graded or may have been graded.

Q. Well, does or does not the evidence there show clearly that it has been graded?

A. Yes, I should think that it had been graded at one time.

(Testimony of Stanley E. Dean)

Q. How far out into that roadway did the foot of the guy wire stand?

A. Nine feet to the telephone pole.

Q. And where did the telephone pole stand?

A. Practically on the northern limit of the roadway.

Mr. GOSE: We will stipulate, Mr. Sharpstein, that the closest traveled way was within thirty-one inches of the foot of the guy wire.

Mr. SHARPSTEIN: Yes.

Mr. GOSE: You will stipulate that it is just a half a mile between the railroad crossing where the accident occurred and College Place road; no trouble to prove that.

Mr. SHARPSTEIN: It is practically half a mile, no question about that.

Q. And the distance from the railroad crossing to the city of Walla Walla is about what, the O. R. & N. depot?

A. About a mile.

CROSS-EXAMINATION.

Mr. AVERY: You haven't offered that in evidence, Mr. Gose?

Mr. GOSE: Yes, I want to introduce it in evidence.

The COURT: It will be received and marked plaintiffs' Exhibit "A" as before.

Thereupon said map was admitted in evidence and marked PLAINTIFFS' EXHIBIT "A", and is hereto attached and hereby made a part of this Statement of Facts.

Mr. AVERY: Q. What are the red lines, Mr. Dean?

A. That is an indication of the road as originally

(Testimony of Stanley E. Dean)

laid out and directed laid out and returned as laid out to the county commissioners by the county surveyor.

Q. And when you take that part of the map, take two parallel lines, the upper one of which is a dotted one, and below the dotted line it says "Wallula county road," that is the portion which you call the present road?

A. Yes, sir.

Q. And when you said to the jury a moment ago that that indicated the limits of the traveled part of the road. you did not mean that exactly, did you; you meant that was the part of the public highway as you looked at it?

A. As I understood it.

Q. The fact is that there is a comparatively small part of that traveled, isn't that true?

A. Yes, sir.

Q. The sides of it is all grass, is it not?

A. Grown up with weeds.

Q. Now, you say that that road, assuming that it is a road from one fence to the other—you are talking between fences now—assuming that is sixty feet wide, do you recall how long that road has existed in that condition?

A. To my knowledge it has been in about its present locality for over twenty years.

Q. And the telephone line has also run down there for longer than that to your knowledge, hasn't it?

A. As long back as I remember, the present telephone line has been there.

Q. Over twenty years?

A. Yes.

(Testimony of Stanley E. Dean)

Q. And it is traveled now just the same as it was when you first knew it?

A. Yes.

Q. When I say traveled now, I refer, of course, at all times to the time of the accident.

A. Yes.

Q. The accident happened two years ago, I believe. You say the guy wire is from the north side of the roadway about nine feet?

A. Nine feet; yes, sir.

Q. Isn't it about eight feet eight inches, or did you make it nine?

A. I can not not now recall, but it is marked nine feet on that plat, and I took great care in making it, is all I can say now.

Q. Do you remember how far the macadam comes to the guy wire; you testified before as to that, that the macadam came within about four feet of the guy wire; is that about right?

A. That is about as I recall it.

Q. And when you say macadam you mean the part of the street that is artificially fixed up with a macadam process?

A. With the broken rock.

Q. With the broken rock?

A. Yes, sir.

Q. Well, when you said thirty-one inches between the guy wire and the traveled part of the street, you did not refer to the macadam itself, did you, but rather to the raw ungrassed part—in fact, it is about this way, is it not, you took from a point inside—thirty-one inches

(Testimony of Stanley E. Dean)

south, I will say, of the guy wire to the fence, it is all grass, isn't it?

A. Yes.

Q. It is all grass?

A. It was at the time I surveyed it.

Q. Well, I mean at the time, yes. And then there is a space of from the guy wire—I was going thirty-one inches south of the guy wire, from that point how far is it to the macadam, to the north edge of the macadam?

A. Well, as I recall it it is about two and a half feet.

Q. As a matter of fact, I guess that is right. Then there is two and a half feet of place where there isn't any grass between the macadam and the place where there is grass?

A. Yes.

Q. And then there is thirty-one inches to the north beyond that is the guy wire, or was at that time?

A. My recollection, Mr. Avery, is that it was thirty-one or thirty-two or thirty-two and a half, something like that, from the anchor of the guy wire to the point where the macadam could reasonably be supposed to begin. Of course, it thins out.

Q. The macadam on the surface does not begin at that point?

A. No, sir; not on the surface.

Q. But does begin two and a half feet further in?

A. Yes, sir.

Q. Now, the macadam is about sixteen or eighteen feet wide?

A. About eighteen feet wide.

Q. I was just trying to get it straightened out, on

(Testimony of Stanley E. Dean)

your testimony on the other trial. Then there is a traveled space on that road at the point—or was at the time of this accident, of about eighteen feet?

A. Yes, sir.

Q. And that outer edge, the northerly edge of that traveled space of eighteen feet was about five feet from the guy wire—approximately, I am not asking you to state precisely; it would be about twice thirty-one inches or thirty inches?

A. I had those on the former trial all at my finger ends. Of course I have forgotten, unless I could refresh my recollection from something; I am not able to remember those precise distances.

Mr. GOSE: If your honor please, we have already stipulated it was thirty-one inches from the guy wire to the traveled roadway; that is exactly what our stipulation provides.

Mr. AVERY: I am talking about the macadam; the macadam the witness says, is eighteen feet wide.

A. Practically eighteen feet wide.

Q. And the macadam is about two feet and a half from the grass, that is right?

A. Yes, sir.

Q. That is, the macadam is south two feet and a half from the grass?

A. Yes, I should think so.

Q. And the grass, the edge of the grass is two feet and a half or thirty-one inches, something like that, south of the guy wire?

A. Yes, sir.

Q. That is what you testified to. That is a fairly

(Testimony of Otto Hoffman)

representative section of the road along there, is it, across section?

A. Yes, sir.

Q. I mean approximately?

A. About the same all the way along.

Q. Now, you said something about it being graded, or Mr. Gose asked you something about it being graded the full width. As I now understand you, I don't think you meant to state it that way. There isn't any grading in the grass at all, is there?

A. There is evidences close up to the fence, looking under the weeds, it is all grown to weeds.

Q. Well, that has been there for years?

A. That at some long time ago ditches had been plowed along to grade it.

Q. Well, there is no indication along there of any improvement for the street except for ditch purposes, is there?

A. Just a ditch. There is no indication of any travel there.

By Mr. GOSE:

Q. Do I understand you by that as saying, Mr. Dean, that it is not graded the full width, that the street is not actually graded the full width?

A. Well, of course it depends a good deal on the definition of the word graded. There has been some improvements made to the full width of the road; there is some plowing done, you can look under the grass and see that it was, there was a ditch up to the fences.

Witness excused.

OTTO HOFFMAN, called and sworn as a witness on behalf of the plaintiffs, testified in part as follows:

(Testimony of Otto Hoffman)

DIRECT EXAMINATION.

At some place there we met a horse and buggy coming down the street, down the road, and we passed them and went on to College Place and turned around there and came back. And two hundred yards from the crossing we met the same buggy going down again and we passed them, and we went on the right hand side and kept on going until we got there at the railroad crossing, and it seems Mr. Morrison made some remarks, told the driver to be careful about the railroad crossing, and the first thing we knew we were going over the railroad crossing, over the railroad tracks, up the right of way and hit this guy wire and of course the car upset.

CROSS-EXAMINATION.

Q. Where did you say someone said, "Look out for the railroad track?"

A. That was Mr. Morrison; that was right after we passed the buggy, Mr. Morrison said, "Look out for the railroad crossing."

Q. Who was he talking to?

A. Talking to the driver.

Q. What occasioned him to speak to the driver in that way?

A. He wanted to tell him, just to remind him of it, just to slack up for the railroad crossing.

Q. Well, he had been over that two or three times before that night, hadn't he?

A. Yes, I know, but he told him anyway, just to remind him of it.

Q. Did he tell him that other time when they passed the track?

(Testimony of Otto Hoffman)

A. No, sir.

Q. Didn't say a word that time?

A. He may have, I don't remember.

Q. But the second time he told him to be careful of the railroad crossing?

A. To be careful of the railroad crossing.

Q. You didn't know any reason why he told him that?

A. Of course we seen the buggy right there, the buggy just passed there.

Q. He didn't say anything about the buggy?

A. Mr. Morrison?—no, he seen the buggy and then slacked up then.

Q. He did slack up some when he said, "Look out for the railroad track?"

A. Slacked up after that.

Q. And then he said, "Look out for the railroad track?"

A. He slacked up twice, before and after he passed the buggy.

Q. And then he said, "Be careful of the railroad track?"

A. Yes, sir.

Q. After he passed the buggy?

A. Yes.

Q. Was there any indication that he did not have control of the machine?

A. He had control of the car.

Q. Then what was he doing out of the road?

A. He wasn't out of the road; he was in the road then.

(Testimony of Otto Hoffman)

Q. He was in the road then?

A. Yes, sir.

Q. Didn't I understand you to tell one of the jurors that at least the left hand wheels were outside on the railroad track?

A. That is after he passed the buggy. I am talking about passing the buggy now.

Q. How is that?

A. That was after we passed the buggy. We were in the road when we passed the buggy, right along.

Q. What was he doing off the road, if you didn't understand me, at the time the juror was asking you about?

A. Oh, that was when he got on the railroad crossing, that was probably—I don't know how many feet, just a short distance below the crossing, he was making the turn, and he tried awfully hard to make this turn.

Q. Tried awfully hard to make this turn?

A. Yes.

Q. Why was he trying hard to make the turn?

A. Well, the roads were wet and slippery.

Q. Had you had any trouble before that?

A. No, sir, none whatever.

Q. No trouble whatever. How fast were you going?

A. Why, before we passed the buggy we were going at the rate of about thirty miles an hour, and then of course he slacked up.

Q. You know you were going forty or fifty miles an hour, don't you, Mr. Hoffman?

A. Well, I don't believe we was. I have ridden in machines a whole lot.

(Testimony of Otto Hoffman)

Q. Now just before, a few rods before you came to the railroad crossing, where were you in the street coming back?

A. We were in the center of the street.

Q. You were in the center of the street?

A. Yes, sir.

Q. Did you get off the street though?

A. No. Two left wheels came off from the street.

Q. The two left wheels came off from the street?

A. Yes, sir.

Q. Where?

A. On the lower side of the crossing.

Q. When you were crossing the railroad track?

A. Yes, sir.

Q. How did they get off the street?

A. He had turned there, a kind of double turn.

Q. Couldn't he handle the car, was he going so fast that he couldn't handle it?

A. Well, it is an awful heavy car, weighing almost two tons, and it is an awful heavy turn for a car like that.

Q. You say the car weighed two tons?

A. Almost two tons.

Q. What did Mullinix say when he was told to look out for the crossing?

A. Didn't say anything, he was looking ahead there.

Q. How far were you from the crossing when that happened, when he said that?

A. I was probably one hundred yards.

Q. Did you say anything to Mullinix?

A. At what time?

(Testimony of Otto Hoffman)

Q. Well, at any time when you were riding?

A. Oh, I was talking with him all the time.

Q. Were you talking with him after you had made the turn to come back the last time?

A. Talking with him all the time.

Q. You were talking with him all the time?

A. Yes, sir.

Q. Did you tell him to run slower, or stop the car; did you tell him he was running dangerously, or chide him, or anything like that?

A. Why, as long as there wasn't anybody on the road there—every time we passed a rig we slowed up.

Q. Every time you passed a rig you slowed up?

A. Yes, sir.

Q. Why would you slow up?

A. To avoid an accident.

Q. You were going at a speed that would suggest an accident?

A. Why, in passing a buggy you would have to make a little turn and slack up some.

Q. Slack up some because you were going pretty fast; how fast did you go that night when you were doing your best?

A. The fastest we went is going up there, about thirty miles an hour before we passed this buggy, we seen the buggy coming and slowed up, slacked up and kept slacked up until we got to the crossing.

Q. Had you all evening been increasing your speed a little bit?

A. No, sir

(Testimony of Otto Hoffman)

Q. Had you been going thirty miles an hour when you were with Mr. Lester?

A. No, sir.

Q. Well, you just increased it the second time?

A. Yes, sir.

Q. Did anyone say anything about going fast?

A. No, sir.

Q. Now when did you first know that they were off the road, that is, out of the regular traveled part of the road?

A. Why, it was—I noticed it right away, I suppose —well, between fifteen and twenty feet below that crossing, it may not have been that. I don't think it was that far, I don't think it was over twenty feet or twenty-five feet.

Q. Well, you didn't know that you were on the railroad track, off of the road, until you were actually there, or going to be there?

A. Oh, I know that the left hand wheels were off of the roadway, on the crossing.

Q. They were going over the track that stood, from the bottom of the ties up to the top of the rails, twelve or fifteen or eighteen inches?

A. No, it wasn't that high.

Q. What is that?

A. It wasn't that high.

Q. How high was it?

A. I don't think it was over that high (indicating), where the rails were.

Q. What is that?

A. I don't think the rails were over that.

(Testimony of Otto Hoffman)

Q. You don't think they were; well, you have got eight or ten inches there, haven't you?

A. Six or eight, I suppose. The ties were buried in the ground, and the rails on top of them.

Q. When you struck the railroad then, that is the last you knew of it?

A. I remember the car going over the railroad tracks, I could feel a slight jar.

Q. Well, it gave you a slight jar. You don't mean to say that that car gave you a slight jar?

A. It didn't throw us out.

Q. What is that?

A. It didn't throw us out of the car.

Q. It did jar you a little?

A. It jarred us a little bit, I noticed we were cross ing the rails.

Q. You said that Mullinix was trying hard to turn the machine when you got up to the crossing?

A. Yes, sir.

Q. Well, did it show hard effort on his part?

A. Well, I noticed he was trying—seen a curve there, and he tried to turn it, and of course it was wet and slippery, and he skidded some.

Q. What was he doing, twisting the wheel?

A. No, sir, a small turn.

Q. What was he trying hard to do, what was his action?

A. Trying to get over this.

Q. What did he do?

A. Started to turn the wheel so as to get over this roadway.

(Testimony of Otto Hoffman)

Q. That is what he was working hard at?

A. Oh, not extra hard; I noticed he was trying to keep on the principal course all the time.

Q. You said a little while ago that he was trying hard to make the turn, and I want to know just how he was working?

A. Well, he looked ahead. It was raining a little bit, and in the early part of the evening considerably so, and it was wet.

Q. Did he set the brakes?

A. Yes, sir, he had them set when he got on the crossing.

Q. He set the brakes after he got on the crossing?

A. Yes, sir, he must have, because the brakes were on.

Q. He set them just before he got on the crossing?

A. I don't know.

Q. They were set during the passage?

A. I don't know how they were set, how long they were set.

Q. Well, then, Mullinix was trying to stop the car then when this happened?

A. I don't think the power was shut off; he wasn't trying to stop it.

Q. Don't you think, Mr. Hoffman, that he was trying to stop the car when he struck the railroad?

A. I don't believe he was.

Q. You don't believe he was?

A. We were on the proper course on the road, straight up the road.

Q. You were on what course?

(Testimony of Jasper Morrison)

A. The proper course, we were going straight up the road, we could look straight up the road, you know.

Q. Which way was your car aimed as to that road, which way was the front of the car aimed?

A. It was aimed straight up the road. Of course it wasn't on the road then.

Q. You mean it was parallel with the road where it struck the railroad?

A. It wasn't on the road, you know. One-half of the car was on the road then.

Q. Well, was it aimed parallel with the road that crosses the railroad?

A. Well, not parallel, no.

Q. Well, straight up what road do you mean?

A. This road that goes up towards Walla Walla, the county road.

Q. Was it parallel, its aim, with the Walla Walla road?

A. It wasn't parallel with the road.

Q. Well, you said straight up the road?

A. Well, it was, but it wasn't on the road; the car wasn't on the road; it had to make that slight angle to go on the road.

JASPER MORRISON, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

DIRECT EXAMINATION.

Q. You may state in your own way just how the accident occurred and what happened that evening?

A. We rode down as far as the Blalock Fruit Place, where you join to go to College Place, and we turned around and started back, and we met that buggy again,

(Testimony of Jasper Morrison)

and in about two hundred yards or so, I said to the driver, "Look out for the crossing."

CROSS-EXAMINATION.

Q. When you were going back you told him to look out for the tracks?

A. Yes, sir.

Q. He is a chauffeur, isn't he?

A. I don't know whether you would call him a chauffeur or not. He was driving the car. I believe he had an interest in the car at that time, I don't know.

Q. You didn't know whether he had any experience or not?

A. No, sir.

Q. He didn't do anything that would indicate that he did not have experience?

A. No, sir.

Q. Then why did you tell him to look out for the tracks when you were coming back?

A. Well, I simply thought that he had better look out for the crossing, the same as I would be riding up Main street here.

Q. Did you tell him when you went up and you were crossing on the other trip, did you tell him to look out for the crossing?

A. No, sir.

Q. Why didn't you then?

A. Well, because I didn't know anything very much about the crossing; it was my first ride out there.

Q. Had you ever seen that crossing before?

A. No, sir.

Q. Never had been out there before?

(Testimony of Clarence Maxfield)

A. No, sir.

Q. And it occurred to you as a place where a fellow would have to look out?

A. Yes, sir.

Q. Well, they did speed up a little higher at that time, didn't they?

A. I don't know.

Q. Oh well you had not been out there before, and you didn't know how fast they had been going?

A. No, sir.

Q. How far west of the crossing do you think it was where you said that?

A. Sir?

Q. How far west of the crossing was it where you said, "Look out for the railroad tracks?"

A. Oh, I should judge about two hundred yards.

Q. You thought you were right at the track, did you?

A. No, sir.

Q. Didn't know where it was, but you thought you would take a long shot at it and talk early, is that right?

A. It is natural if there is any place dangerous a man will, if he thinks there is any danger, will generally warn a fellow, that is what I thought.

Q. You thought it was a place sufficiently dangerous that a man ought to be warned?

A. Yes, sir, on account of the quick turn.

CLARENCE MAXFIELD, witness called and sworn on behalf of the plaintiffs, testified in part as follows:

(Testimony of Clarence Maxfield)

DIRECT EXAMINATION.

Q. You may state to the court what occurred at the time of the accident in the way of taking a ride?

A. Mr. Mullinix invited the boys to go and take a ride again. And we came down Second street, to the east part of the town for five or ten minutes, and back down to the engine house up here on Alder street, and down there to Alder street, to the hospital there, I forget the name of the street, and turned on to Main, to the depot, and stopped at the Oxford and got a drink. Then went from there down to the macadamized road and stopped at the Blalock's and turned and came back. And Mr. Morrison, he made the remark, he said, "Look out for the railroad crossing." That is as far as I know about it.

Q. What experience had you had prior to that time in riding in automobiles, Mr. Maxfield?

A. Not any.

CROSS-EXAMINATION.

By Mr. AVERY:

Q. Did you hear Morrison tell the driver to look out for the railroad?

A. Yes, sir.

Q. You know why he did that?

A. I suppose kind of to avoid an accident.

Q. In other words, from what you saw that it was the proper thing to tell him at that time?

A. Yes, sir.

Q. In other words, it suggested that there would be an accident if something was not told him?

A. Well, I suppose.

(Testimony of W. H. Buck)

Q. What?

A. I suppose not.

Q. You suppose not?

A. I suppose so.

W. H. BUCK, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

DIRECT EXAMINATION.

By Mr. GOSE:

Q. When you went there, how did you find the situation with reference to the automobile and the guy wire?

A. When I went down there in the morning I went down more to see the accident than anything else, I found the automobile had left the crossing on the north rail of the crossing—there was a plank crossing in it at that time, going over the south rail of the railroad track there four or five ties from the end of the plank crossing at that end. The left wheel of the automobile had skidded—well, in fact, both of them, but the left hand wheel showed very plainly beside the macadam road in the crossing.

Q. As it approached the—

A. As it was approaching the wire. Now this is on the south side of the railroad track.

Q. That was between the railroad track and the guy wire?

A. And the guy wire.

Q. Now wait until I get the exhibit here, Mr. Buck, and explain that exactly as you saw it that morning. The point marked "Telephone Pole" and the point marked "Anchor for Guy Wire," are on the south side of the railroad track?

(Testimony of W. H. Buck)

A. On the south side.

Q. And you say the track showed what, in the neighborhood of that?

A. That they got out of the direct line of the road, you could see it very plainly, between the railroad track and the guy wire, from the time it hit—that is, up to the time it hit the guy wire, then it looked just like the car—it was laying—oh, I should judge, some twenty feet facing the fence and the highway—facing north like, like it was turned over.

Q. And what did the tracks show going up to the guy wire?

A. That he was outside of the main traveled road, with the left hand wheels over the crossing until he hit the wire.

Q. Where were the right hand wheels?

A. They were on the macadam road.

Q. Did you observe the line of travel of the tracks on the north side of the road—of the railroad?

A. Well, the car, you see, going right—I should judge it hit the rail either the fourth or fifth tie from the crossing at that time, that is, the plank crossing that was in there at that time.

Q. Which wheel hit that?

A. The left hand wheel.

Q. The left hand wheel?

A. Yes, and from the time it hit the tie and left the ground you could see it very plainly then up to the time it hit the wire. And the right wheel was on the macadam road.

(Testimony of F. W. Breed)

CROSS-EXAMINATION.

By Mr. AVERY:

Q. Mr. Buck, you say the left wheel of the automobile struck the railroad four or five ties east of the crossing?

A. That is the south rail of the railroad.

Q. Didn't it strike the north rail?

A. Well, it did that right at the crossing, that is, at the end of the planks—they didn't go straight across the railroad tracks.

Q. They were going right down the railroad track about half way upon the railroad track and half way upon the road?

A. No, you see the north rail—the left hand wheels of the automobile left the road bed at the crossing, that is, crossing the planks crossing, and going over the south rail of the railroad, either four or five ties east.

F. W. BREED, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

DIRECT EXAMINATION.

By Mr. GOSE:

Q. Now, you may describe to the jury what evidences you saw of the manner in which the car crossed the railroad track, and struck the guy wire?

A. Well, the right wheel as I stated there would be —is what is known as the roadbed.

Q. Would be in the roadbed?

A. That is where teams ordinarily travel, it would not be in the middle of the road, I don't mean to say, but at the edge of the road.

Q. And the left wheels?

(Testimony of F. W. Breed)

A. The left wheels were over, off the road.

Q. Off the road?

A. Yes, sir.

Q. Then did you observe the tracks as they approached the guy wire?

A. Why, I will tell you the way it looked to me, the same—the way the guy wire is there on the side of the road, it looked to me as though they ran in there and hooked right on to the guy wire with the left wheel, and the tracks to the left there looked as though the machine had possibly swung around.

CROSS-EXAMINATION.

Q. And you didn't see any track of the automobile leading up to the splintered place on the tie, the railroad tie; you didn't see any automobile track leading up and hitting the rail and the tie and splitting the tie?

A. Well, I could not do that hardly, for that season of the year, because it is pretty covered with this foxtail, there would be quite a sod along there.

Q. You could not see the track very well if there had been one there?

A. I don't think you could see one at all if there had been one, I don't know, I didn't notice it.

Q. The point where the tie is splintered is right out in the grass, isn't it?

A. Well, it is right at the end—it would not be out in the grass there, I guess they keep that roadbed pretty well cleaned, but it was some—oh, I don't know, two or three ties out. I will tell you from what I have seen of looking over the ground since, I should say between three and four feet away.

(Testimony of Simon Maloney)

Q. The railroad crossing at the time this accident occurred, was a plank crossing, wasn't it?

A. Yes, sir.

Q. And you know how long those planks were, forming the crossing?

A. I never measured them, but I should judge that they were eighteen feet planks.

Q. And since then they have been taken up and dirt crossing considerably wider than the old crossing put in in place of it?

A. I don't think this dirt crossing is as wide as the other crossing.

Q. In other words, the planks extended beyond the traveled road after the macadamizing was put in?

A. They would extend out there probably—oh, easily two feet.

Q. Each end beyond the traveled road?

A. On each side, yes, sir.

SIMON MALONEY, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

DIRECT EXAMINATION.

Q. What was the size of the guy wire?

A. It was about five or six wires, probably nine wire.

Q. What would you say its diameter was?

A. Oh, it was less than a half inch.

Q. What guarding, if any, was put around it?

Mr. SHARPSTEIN: We object, if the court please, on the ground that there is no charge of any negligence in the construction of the wire, or its arrangement, the mere charge being that it was put in the road at all.

(Testimony of T. F. Robb)

Mr. AVERY: The same question came up on the other trial.

The COURT: In so far as it is basis for the charge of negligence, of course you cannot prove what you have not alleged.

Mr. GOSE: The pleading says wrongfully and without authority of law and contrary to law attached to said telephone pole a guy wire which extended from said telephone pole out into said highway a distance of about ten feet. I hardly see that I would require any testimony to the effect that it was anything other than a guy wire, that it would be a matter of defense if it was guarded in any way. That would be my impression.

The COURT: Of course as far as this particular case is concerned, I don't think any guard would have been any protection to those parties.

Mr. GOSE: I don't know, it may have been seen and avoided, and it might not. I don't think there is any great materiality in it, but I think under the circumstances I am entitled to show that guy wire under that allegation.

The COURT: You can describe the guy wire, yes.

Mr. GOSE: He has described the guy wire.

The COURT: Yes, he said a guy wire less than half an inch in diameter and twenty feet long running up from an anchor, I think that is pretty fully described, Mr. Gose.

Mr. GOSE: I think so, all that is necessary.

T. F. ROBB, a witness called and sworn on behalf of the plaintiffs, testified in part as follows:

(Testimony of T. F. Robb)

DIRECT EXAMINATION.

Q. You may state just how you found the car, and where you found it, in what situation it was?

A. Oh, I found it about twenty or twenty-two feet east of the guy wire, or sitting crossways of the road. The right wheel—the right front wheel, the steering spindle was bent, and the wheel locked clear down on to the car. The top and glass front was broken, the steering wheels and the fenders were bent up pretty bad.

Q. Did you see any glass around there?

A. Yes, sir.

Q. Where was that glass?

A. It was right near where the car was.

Q. Did you examine to see if there was any glass between there and the railroad track?

A. Well, I went over the ground.

Q. Did you see any glass there?

A. No, sir.

Q. Where did that glass come from?

A. From the wind shield.

Q. Where did the wire strike the car?

A. Well, between the hood and the front fender.

Q. Well, what evidence did you see on the car of any marks?

A. Well, there was a mark up over the hood, you could see where it struck the glass front, a wire mark across the hood, the right hand side of the hood.

Q. Just state where that mark was, and what it looked like?

A. Well, it was just a dent in the hood.

(Testimony of T. F. Robb)

Q. On which side of the right lamp did the line of dent show?

A. On the inside.

Q. On the inside, between the—

A. Between the fender and the hood.

Q. Did you see any tracks of the machine there at the guy wire?

A. Yes, sir.

Q. How did they go up to the guy wire, where was the right wheel track?

A. A little to the right of the anchor post, the front one, the right wheel.

Q. Do you know what it costs to repair the car?

A. Not exactly. I didn't do the work.

Q. What repairs were necessary on it?

A. Why, there was two fenders, I believe, and the dash, a new dash, top and glass front.

Q. What injury was done to the top?

A. Oh, it was all mashed up, the body was broken and the left rear wheel.

Q. What was the condition of the left rear wheel?

A. Well, the spokes were split, three or four spokes, and the felly of the wheel.

Q. What was the weight of that car?

A. 3880 pounds.

Q. What was the size of the wheels?

A. It carried a tire forty-eight two by four and a half, the size of the tire.

Q. Then what would be the diameter of the wheel?

A. Forty-two inches, I believe.

(Testimony of T. F. Robb)

CROSS-EXAMINATION.

Q. How had the machine gone from that guy wire, according to the tracks to the point twenty or twenty-two feet?

A. Why, the rear end skidded around.

Q. The rear end had just skidded?

A. Yes, and tipped over.

Q. What?

A. And then the car tipped over on its side.

Q. Then it tipped over and came way over and came up on its—

A. No, sir, I don't think so.

Q. I thought you said it was standing right side up?

A. It was.

Q. What do you mean?

A. Why, I think that it righted itself up again, didn't go clear over.

Mr. AVERY: No, I said by the track, how it appeared to go down to that point where it was twenty-two feet beyond?

A. I could see where the rear of the car had skidded there in the road.

Q. You could see where the rear of the car had skidded, and it didn't show any indications of having turned away over?

A. It went over on its side.

Q. What is that?

A. I say it tipped over on its side, it went over on its side, I could see the marks in the road, in the dirt.

Q. What marks were there that you saw there that indicated that?

(Testimony of T. F. Robb)

A. I saw some dirt on the upholstery, on the tonneau.

Q. You don't know that of your own knowledge?

A. No.

Q. What I mean is, it didn't tip clear over and come up square again?

A. I could not say exactly as to how it happened.

Q. What is that?

A. I could not say exactly as to that.

Q. Were there any marks to show that it had done that?

A. That it rolled over?

Q. Yes, made the complete revolution, turned over, and then landed on its base again?

A. No, sir.

Q. It was standing squarely on its base when you saw it?

A. Yes, except the right front wheel was dished.

Q. And the top was smashed in, you said the top was all torn to pieces, didn't you?

A. Yes.

Q. Pretty near at right angles with the street, was it, right across?

A. Nearly so.

Q. What marks were there to show how the front wheel got from the guy wire to the point where you found them; you have told us about the skidding of the rear; now what marks did the front wheels make after passing the guy wire?

A. Well, you could see where they had tore up the ground there some.

(Testimony of T. F. Robb)

Q. They had torn up the ground some; considerable?

A. Oh, not much.

Q. About as much as the back wheels?

A. Just about, I suppose; the front of the car, though, did not light as quick as the rear.

Q. In the air, there were places that it didn't touch at all?

A. Why, leaving the wire it did not.

Q. What was the damage to the machine up at the front end of it?

A. Oh, the axle was sprung, and the steering spindle.

Q. The what?

A. The steering spindle.

Q. The front axle was sprung?

A. Sprung, yes.

Q. Where was it sprung?

A. On the right side.

Q. Where was the axle sprung, the front axle?

A. Between the spindle and the spring.

Q. Which way from the center is that?

A. To the right.

Q. The axles was sprung to the right?

A. Yes.

Q. How far from the hub?

A. Oh, probably ten or twelve inches.

Q. Ten or twelve inches, that is where the axle was hurt. Now, what else was damaged up at the front end of the car?

A. Well, the fenders were mashed up.

Q. Which fender?

A. They were both of them.

(Testimony of T. F. Robb)

Q. Both of them. Well, how did the right fender look?

A. Oh, pretty badly doubled up.

Q. And how doubled up?

A. Just bruised up.

Q. Just bruised up, and the right—and the left fender was also bruised up?

A. Yes, sir.

Q. How did that look?

A. Well, that wasn't as bad as the other.

Q. Well, just tell the jury how bad it was?

A. Well, it was bent up bad enough, so that it could never be straightened out.

Q. So that it could never be straightened out?

A. To look right again.

Q. It had received a pretty bad shock, hadn't it, that is right?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Speak loud so that we can all hear you. Now, you said the top; that top was completely demolished?

A. Yes, sir.

Q. And mud in it and dirt and gravel?

A. The right side of it.

Q. Now, where was the body broken?

A. Oh, it was just back of the tonneau, underneath, split.

Q. The body then did not receive very serious hurt?

A. Oh, it was jarred up pretty bad.

Q. What?

(Testimony of T. F. Robb)

A. It was loosened up pretty bad all over.

Q. Well, that was something that did not show up very much in general observation of it?

A. It did at the time.

Q. Where did it show up as being broken?

A. Why, you could see it was split here underneath the back side.

Q. It was split underneath the back side?

A. Yes.

Q. Now what about the wheels, what wheels were hurt?

A. The left rear wheel.

Q. The left rear wheel; how was that hurt?

A. Oh, the spokes were split, the felly.

Q. The spokes in the left rear wheel were broken out?

A. They were not broken clear out; they were split up pretty bad.

Q. And how was the felly on that, was that broken?

A. That was split.

Q. And the wheel was generally dished?

A. Oh, I could not say as to that; it looked apparently rather straight.

Q. It looked rather straight, but it was confined to the broken spokes and the felly; how badly were the spokes broken, a number of them?

A. Oh, there were three or four or five altogether.

Q. Were the spokes out of the felly or how?

A. No, sir.

Q. Now, how were the tires?

(Testimony of T. F. Robb)

A. The left rear tire was scraped off a little, the rubber off of the side of it.

Q. The left rear tire had the rubber scraped off from the side; it was punctured, wasn't it?

A. Yes.

Q. A great big puncture in it, wasn't there?

A. No, sir.

Q. Did the right rear tire have a puncture in it?

A. There was one, just the one, that was flat when I found the car.

Q. Well, am I using the right terms when I call that outer casing a tire?

A. No, sir.

Q. That is not a tire?

A. Yes, sir.

Q. It is a tire, and the inner tube, do you call that the tire also?

A. The tube.

Q. They call that a tube?

A. Yes.

Q. Well, this left hand rear wheel then, the top was busted and the outer casing was busted?

A. I don't just remember. There wasn't only one of them flat. But the left rear one, the rubber was chafed off, down next to the fibre.

Q. How was it, just scraped off apparently?

A. Oh, a little chunk two or three inches.

Q. Gone right down through the rubber to the fibre?

A. Yes.

(Testimony of T. F. Robb)

Q. Now, that was also the wheel that had spokes and felly broken?

A. Yes, sir.

Q. And no other wheels were hurt any?

A. No, sir.

Q. Then it is confined to the two fenders and the dash—and when you say dash you mean the wind shield?

A. No, sir.

Q. You don't? What happened to the dash then?

A. That was all splintered up and busted.

Q. Did you see anything wrong with the front right wheel?

A. No.

Q. That was all right, wasn't it?

A. I believe it was.

Q. And the rear right wheel?

A. Yes.

Witness excused.

Whereupon the plaintiffs having rested, the defendant, by its attorneys, challenged the sufficiency of the evidence to sustain a verdict in favor of the plaintiffs, or any of them, and against said defendant, and moved the court to take the case from the further consideration of the jury and to enter a judgment for the defendant. The grounds upon which said motion was made, were that the evidence adduced by the plaintiffs failed to show that the defendant was or had been guilty of any negligence in connection with the matters and things charged in the complaint, and that said evidence further showed that the plaintiffs, and each of them, were guilty

(Testimony of W. W. Baker)

of contributory negligence, and that their contributory negligence brought about respectively the injuries and damages alleged by them respectively to have been sustained. That said motion was duly argued by the attorneys for the respective parties in open court, and was by the court denied, to which ruling the defendant excepted and an exception was allowed. Thereupon the defendant proceeded to introduce testimony in support of its answer herein, and the following proceedings were had, to-wit:

DEFENDANT'S CASE.

W. W. Baker, a witness called and sworn on behalf of the defendants, testified in part as follows:

DIRECT EXAMINATION.

Q. Will you state your name to the jury, Mr. Baker?

A. W. W. Baker.

Q. And you reside in Walla Walla?

A. Yes, sir.

Q. In the banking business here?

A. Yes, sir.

Q. And how long have you resided here, Mr. Baker?

A. Something over fifty years.

Q. Are you familiar with what is known as the Wallula road running westerly from the city?

A. I am.

Q. And at the point of the intersection about a mile or such a matter out, with the O. R. & N. railroad?

A. Yes, sir.

Q. I ask you if you recall the accident which these plaintiffs met with about the 2nd of April, 1910?

(Testimony of W. W. Baker)

A. Well, I was there the following morning, Sunday morning.

Q. What time were you there Sunday morning?

A. Well, I should judge it was in the neighborhood of half past eight or nine o'clock.

Q. Half past eight or nine o'clock in the morning. And did you at that time examine and look over the ground?

A. Yes, sir. I probably stayed there fifteen or twenty minutes, possibly twenty minutes; I was interested in the automobile, and I wanted to see what the nature or cause of the accident was.

Q. Were there any others there with you?

A. Yes, sir.

Q. Who were they?

A. My two sons went down with me, and Oscar Drumheller was there at the time when I got there, and I think Mr. Lamb was there, and one or two others, I don't remember the gentlemen.

Q. Did you see evidences of trouble there?

A. Yes, sir.

Q. Did you see where the automobile had come down from the west, coming up to the crossing?

A. Yes, I saw where a track had left the main road to the left.

Q. Did you make a little sketch of it? Have you since?

A. Yes, sir, I did.

Q. At whose request did you make it?

A. Well, Mr. Gose asked me two days ago if I would not go down over the ground with him and give him

(Testimony of W. W. Baker)

my view of the case. I did. And then yesterday we were talking about it again and he seemed to think that I had not stated the case correctly, so he asked me to go down again.

Q. You need not tell what he said, Mr. Baker; he asked you to go down?

A. Yes, sir.

Q. Did you go down with him?

A. Yes.

Q. Well, I ask you if you recognize this paper that purports to be a map, that I am handing to you?

A. Yes, sir.

Mr. AVERY: And I will ask that this be marked defendant's Exhibit 1 for identification.

Thereupon said map was marked Defendant's Exhibit No. 1 for identification.

Q. Now, I will ask you who made that?

A. I did.

Q. I will ask you what it represents?

A. Well, these two yellow lines represent the railroad track, and the space between these two green lines represent the wagon road approximately as it is now traveled.

Q. Well, as it was traveled then?

A. No, sir, I think not; as it is now traveled.

Q. Is there any substantial difference between as it is now traveled and as it was traveled then?

A. Well, my impression is that the road was narrower then than it is now.

Q. Where?

A. Well, all the way along, I think.

(Testimony of W. W. Baker)

Mr. AVERY: Q. Well, I will ask you if the crossing of the road at the railroad is the same now that it was at the time of the accident?

A. At the time of the accident, as I remember it, there was a plank between the rails, and the distance then I think was in the neighborhood of eighteen to twenty-four feet of planks, I should say eighteen to twenty-four feet. Last evening when I measured it with Mr. Gose it measured thirty-six feet, measured with the rail, along the rail.

Q. Then the crossing was at that time narrower than it is now?

A. Yes, sir.

Q. I see some red lines on the map. Will you state what they are?

A. These red lines here indicate a mark or track to the left of the road coming up towards town that I saw at the time that I was there, the morning after the accident. I cannot say that this red line here between the two green lines was there, because there had been some other automobiles along there, and probably had covered it up, but what my attention was called to particularly was this red line here outside of the road, and it started back, leaving the road at what I measured yesterday was about 120 feet, and I fix that distance by the house and gate that was there, that is, where we walked back and saw the car commence to leave the road. Going along towards the east here the left hand wheel missed a little depression or hole, that is there yet, just about six or eight feet from the railroad

(Testimony of W. W. Baker)

track, just barely missed that and struck a tie. Now that tie is about the fifth—is the fifth tie from the edge of the wagon road crossing it, and the first tie there is barely visible on the end, but the others are very plain in appearance there. This tie here is marked "06".

Q. That is the further or west or east tie?

A. Yes, and if you look the other way it would be "90". Now, the next tie is marked the same way, and the next tie is marked "04", and the next tie is marked "04". Now the right wheel struck that tie.

Q. Now these automobile tracks, so far as they are off the green there, on the north, were visible, were they, as shown by your red lines?

A. This track here was visible, yes, and this track was visible from where—

Q. Well, I say all that is off the green there?

A. All that was off the green was visible.

Q. Could you see where the tracks struck the ties?

A. Yes, very plain, the ties were very badly slivered up.

The COURT: Where was the end of the planking then, Mr. Baker?

A. Well, the end of the planking as I remember it, was about fifteen feet from this tie.

Mr. AVERY: Q. You mean the extreme east tie?

A. Yes. Now, as measured now it is ten feet from that left extreme tie there and the present track as traveled, and I think the plank was down further making about ten or fifteen feet.

Q. Could you make a line there showing the end of the planking approximately?

(Testimony of W. W. Baker)

A. I think I can. (Witness does as requested.) I think that that planking came within fifteen feet or that neighborhood of the left hand tie, the easterly tie.

Q. Now, the arrow that is there under the word "Walla Walla" means that is directed east, isn't it?

A. Yes, this is east and this is north (indicating). This map stands up here and this road runs exactly *north* and *south,* as I understand, along the section line.

Q. What, if any, marks were there on the south side of the railroad track, of the automobile?

A. Well, when I was on the ground the tracks on the south side of the railroad track were pretty well obliterated by the fact that a good many people had been walking around there. However, within thirty feet of the corner of the fence, or where the post stood, there were some marks there that I took to be tracks, but I would not swear that they were, indicating that something had struck there, but on account of the people walking over it, I would not say that there were tracks there.

Q. Well, immediately or anywheres near the south side of the railroad track did you find any car marks, automobile tracks?

A. No, I could not see any indication of a car having been across or in between the tracks, between the point where it struck and where I said within thirty feet of the pole, I could not say that the car had struck the ground at all, there was nothing to indicate that.

Q. Did you look at it with that in mind?

A. Yes, I was looking at it to see how far the car jumped.

(Testimony of W. W. Baker)

Q. And how far from your examination would you say that it did?

A. Well, I could see that it lit, but I don't think it lit closer than twenty-five to thirty feet anyhow, because there was not any tracks up there to obliterate that ground, and there weren't any signs of any car striking there, that is, between the pole and where the car went off on the track, is approximately sixty feet.

Q. I believe you stated that the green lines represented the traveled roadway?

A. The wagon road.

Q. What do you mean—what you mean by that is inside of the grass?

A. Why, the traveled portion.

Q. That is, the red lines indicate the automobile tracks as you found them the next morning except that part of the red line that is between the green lines which you rather estimated, I suppose?

A. Yes, I did not see that, because the road had been traveled that morning.

Q. And that the yellow lines indicate the railroad, and that the ties marked there at the end of the railroad lines indicate the railroad ties?

A. Yes, sir.

Q. It is the gist of the whole situation there, relatively, substantially correct?

A. I think it is. The angles may not be exactly correct.

Q. Well, they are substantially correct?

A. Yes.

(Testimony of W. W. Baker)

Q. And the figures and legends and statements that you have marked on there are substantially true, are they not?

A. Yes, sir, some of them are marked as stepped. I did not measure them with a tape. Other marks here that are not marked as stepped I measured with a tape line.

Mr. AVERY: I will offer this in evidence.

The COURT: It will be received.

Thereupon said map was admitted in evidence and marked DEFENDANT'S EXHIBIT NO. 1 and the same is hereto attached and hereby made a part of this Statement of Facts.

CROSS-EXAMINATION.

Q. Mr. Baker, do you mean to say that just the right wheel of the car struck the edge of the crossing, that the wheels of the car made a sharp turn?

A. I think that there was a general curve of this car coming this way, as I remember it, trying to get back on the road.

Q. Did it make a sharp curve just as it struck the grass?

A. The curve is indicated there.

Q. Don't you think, as a matter of fact, Mr. Baker, that this car came, instead of that way, that it came through here perfectly straight, that there was no essential curve, and that this right line should be drawn relative to this particular map, on practically a straight line above where it is drawn, and the lower red line drawn parallel to it?

(Testimony of W. W. Baker)

A. No, I think not, Mr. Gose; I think that is drawn there as the car run. I had my attention called to it at the time by Mr. Drumheller, in which he claimed that the car was trying to get back on to the track all the way along here, and made the track wider than he naturally thought it would be in that wet ground. I told him that I didn't know how wide the track was, that is, the tire, I could not say as to that, but he was under the impression that the car was trying to pull back.

Mr. GOSE: Q. Just a moment, Mr. Baker, you observed the roadway going towards Walla Walla, the part that they traveled over, was perfectly smooth—was a perfectly smooth roadway except it had grass on it until it got to the railroad track, was it not?

A. Yes, there was only one depression.

Q. And they missed that way behind?

A. No, it wasn't way behind. It is there now.

Q. Yes, but they missed that one, went on the inside of that depression?

A. Yes.

Q. Over ground that was just as fit for travel as the actual roadway?

A. As far as the surface of the ground is concerned I think it was as smooth as the ground, the track was, that was covered with the grass.

Q. Now, when they came on the other side it is equally true that right up to the fence line on the north side of the road there is no reason for any difficulty to travel that roadway anywheres, is there, Mr. Baker;

(Testimony of W. W. Baker)

that roadway is a smooth roadway from the center of the road to the fence line, is it not, except that there is grass on it?

A. It is practically smooth.

Mr. GOSE: Q. Now, Mr. Baker, I wish you would look at this map and observe the contours as shown on this map, plaintiffs' Exhibit "A", and I want to ask you if it is not a fact, that at all times the automobile was within the sixty-foot roadway?

Mr. AVERY: You mean within the sixty-foot fences?

Mr. GOSE: Within the sixty-foot roadway is what I mean exactly. Now, the machine at all times—

A. Well, I would not like to say, because I have not measured across there.

Q. That is all right, I don't care.

A. (Continuing.) I think very likely that on this direction here, that the car would take here, would be within the limits of the roadway.

Q. Now, Mr. Baker, when you were discussing the question of the car lighting and testified you were indulging then largely in speculation, were you?

A. I saw no tracks between where these steps were around here obliterating the tracks that might have been there, between there and where the car first struck the tracks, the railroad tracks, or the ties, I saw no track whatever indicating that the car had passed over that ground.

(Testimony of W. W. Baker and Oscar Drumheller)

RE-DIRECT EXAMINATION.

Q. Will you state which mark on there indicates the pole to which the guy wire was attached?

A. As I remember it, the pole at that time was just south of the corner of the fence, indicated by this red—

Q. That is what I want, that red mark?

A. Here is the pole on the west now.

The COURT: Is the distance of that guy wire from the railroad track shown in the testimony, Mr. Gose?

Mr. GOSE: The distance of the guy wire from the railroad track?

The COURT: Yes.

Mr. AVERY: You mean direct?

Mr. GOSE: Did you measure it, Mr. Baker?

The WITNESS: Yes, I stepped it. It is twelve feet from the corner of the fence; from the railroad track I stepped it over to the fence last night, it is twelve feet.

OSCAR DRUMHELLER, a witness called on behalf of the defendant, testified in part as follows:

DIRECT EXAMINATION.

Q. How long have you been a resident of the city?

A. About forty-five years.

Q. And you are, I suppose, familiar with this Wallula road?

A. Yes, sir.

Q. And you are familiar with the scene of this accident, you have heard about it, of course?

A. Yes, sir.

Q. Have you ever been out there and examined it

(Testimony of Oscar Drumheller)

with a view of what the circumstances and conditions were?

A. Yes, sir, I happened to be on the road the next morning after the accident.

Q. And you can, by referring to that exhibit, if you want to, Defendant's Exhibit 1, or independent of that, anyway, state to the jury just the automobile marks that you found along there, the tracks of the automobile that were evident, plainly evident around there?

A. Beginning at the railroad we could see ties that were slivered, two ties, one for either wheel.

Q. You mean on which, the north side of the railroad?

A. On the north side of the railroad, yes, sir. I walked along the tracks and led up to this tie.

Q. You are talking about the red line on Exhibit 1?

A. Yes, sir, and the line to the north, which would be made by the left hand wheel as it came this way; and I could distinctly follow that line all the way down its course to the main road. The ground—it had rained the night before, and the ground was damp, and wet, and the track was well defined leading up to the railroad. Now, this track had been more or less obliterated.

Q. Now you are talking about the south red line?

A. About the south red line. I could see where it had struck the tie quite plainly, but as to taking its course all the way down, I could not follow it, but I could not follow it, but I could follow this track.

(Testimony of Oscar Drumheller)

Q. The north one?

A. The north one, yes, sir.

Q. Well, what kind of a track did that north one make?

A. Well, it made a circle, if you might call it, quite a true circle, it seemed to go in on the gradual curve from back 120 or 125 feet back to the railroad, just the same angle all around.

Q. How does that map illustrate the conditions up there?

A. Very well.

Q. Is that substantially correct?

A. I think it is.

Q. I refer to Exhibit 1 that you are looking at. You think that is substantially correct, do you?

A. Yes, sir. I helped make some of the measurements and tallied since.

Q. What is the custom in this country or throughout the country here, do the people travel and turn to the right?

A. They do.

Q. And automobilers and teams and horses and persons, the custom is to retain the right side of the road, is it not?

A. Yes, sir.

Q. And this Wallula road was known as the first outlet to Walla Walla, on the west?

A. Yes, I think so.

Q. Do you know what year the road was macadamized?

(Testimony of Oscar Drumheller)

A. I think it was about 1900—or about—yes, 1900 or 1901, along there somewhere; I think it was 1901, but I would not be positive; I might miss it a year.

Q. What effect, if any, did this automobile have on the ties there, or rather at the place where those red lines struck the railroad ties, how were the ties affected?

A. Well, one tie was badly slivered, indicating that rim of the wheel possibly had hooked the sharp corner of the tie. The other tie had marks on it.

Q. Take it at that time from the place where the wheel would be treading, the base of the wheel, how high up would it be to the top of the rail, at the point of that contact, about—I don't suppose you can tell exactly?

A. No, I could not tell exactly, but I would think something like ten inches anyway.

CROSS-EXAMINATION.

Q. Did you see any evidences of the wheels, the tires skidding as they came up to the railway track?

A. Why, I did. That was what made the broad wheel track so easy to follow, but it did not seem to skid any more than it just seemed to leave a track about six inches wide all along the turn, all the way around.

Q. Around the bend?

A. Yes, sir, around the bend, with the one wheel.

Q. Mr. Drumheller, isn't it a fact that the ordinary travel going up that roadway does swing around very much like that swing was made there?

A. That is a hard question to answer. I don't think that many of us get that far out of the road.

(Testimony of Oscar Drumheller)

Q. No, I don't mean that at all. That may be true, Mr. Drumheller, entirely; but isn't it a fact that ordinarily speaking the travel as it swings up the roadway does swing to the north line and then started to the south line, and then up the road; hasn't that been your observation?

A. I think that it is possible that we find if we were in a hurry.

Q. Well, if you were traveling fifteen miles an hour running across?

A. No, it would not be necessary.

Q. This red mark on this map represents the former post, does it not, Mr. Drumheller?

A. Yes, the former post was close to the fence and in the road.

Q. And is the post to which the guy wire was attached at the time of the accident?

A. Yes, sir.

Mr. AVERY: Mr. Gose, do you want me to get the photographer that took this photograph?

Mr. GOSE: No. I wish it understood, however, that that is a reasonable representation, with the exception of the fact that I do admit that that boxing was on the guy wire.

Mr. AVERY: I don't care about that part of it.

Mr. GOSE: I consent to it going in as a reasonable representation, with the exception that that boxing was not on there when that accident occurred.

(Testimony of Oscar Drumheller)

Mr. AVERY: Well, for the purpose of this picture we are not claiming that the boxing was or was not on, or any boxing. They can consider it independent, and I will put in these two pictures. You admit their representation.

The COURT: With that understanding, gentlemen of the jury, these photographs carry with them no evidence or impression that there was any boxing on this guy wire.

Mr. AVERY: Or that there was not.

The COURT: Or that there was not, no evidence of that kind at all.

The COURT: When were the photographs taken; after the accident?

Mr. AVERY: Yes, they were taken after the accident. Taking the one that I will put in as Exhibit 2, Mr. Gose, may I say that represents looking to the west, at the point of the accident.

Mr. GOSE: Yes, that is looking west.

Mr. AVERY: This may be admitted and marked Exhibit 2, so that it may be understood that this is a view of the scene of the accident, and in looking at it you are looking westerly towards Walla Walla. The other picture is looking east toward Walla Walla, generally towards Walla Walla and in an easterly direction, and I would like to have designated here, Mr. Gose, that the place where this boxing appears, is where the guy wire was at that point.

Mr. GOSE: The guy wire actually was situated at the time of the accident as it appears in the picture, it is conceded.

(Testimony of John D. Lamb)

Thereupon said photographs were marked DEFENDANT'S EXHIBITS 2 and 3, and the same are hereto attached and made a part hereof.

JOHN D. LAMB, a witness called and sworn on behalf of the defendant, testified in part as follows:

DIRECT EXAMINATION.

Q. Mr. Lamb, I will be rather brief with your testimony. You live in Walla Walla?

A. Yes, sir.

Q. And were down at the scene of this automobile accident the next morning?

A. Yes, sir.

Q. I will ask you without going through all of this each time, if you see that Defendant's Exhibit 1 there before you. Assuming that these green lines indicate the travel—is the raw as distinguished from the grassy part of the Wallula road, and the yellow line represents the railroad, and the red line represents some automobile tracks, and the other legends and statements are correct, is that a fair representation of the conditions up there the morning after the accident?

A. Yes, sir.

Q. It is. Taking those red lines, which we will call automobile tracks, did they exist there approximately as it is stated they are?

A. Well, the north line was very plain all the way through here.

(Testimony of John D. Lamb)

CROSS-EXAMINATION.

By Mr. GOSE:

Q. In observing those conditions there, Mr. Lamb, you also observed that there was a hole marked "depression" here, and that was in existence at that time as it is today?

A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. What effect, if any, was there or appearance of railroad ties where the automobile tracks came up to them, on the north side.

A. The tie, the left hand tie was splintered quite a bit as though it was stuck by the point of the casing of the rim and tore it up.

Q. And how high from where the automobile wheel stood just before it went on to the track, was the top of the rail, how many inches? I don't suppose you measured it, but give the jury a fair estimate of it.

A. Well, she would come up, a six-inch tie and then a six-inch rail, I should judge, with a natural raise of the grade there.

Q. Well, ten or twelve inches, something like that?

A. It would be all of that.

RE-CROSS EXAMINATION.

Mr. GOSE: Q. Do you know the height of the wheels of the car?

A. Yes, sir.

Q. Did you ever measure them on your body standing to them?

A. No, I didn't measure them to my body.

(Testimony of John D. Lamb)

Q. How high are they?

A. A forty-two inch wheel, something like that, I should judge.

It was stipulated by the parties that the defendant's telephone and telegraph line was built as it existed prior to the accident, in 1903.

It was stipulated that the defendant's telephone and telegraph line was put in in 1893, and this particular guy wire was put in in 1898. The line was changed from the south side of the road to the north side of the road in 1898; at that time this guy wire was put in. It has been on that side of the road for the last 14 years.

It was also stipulated that the defendant in this case, the Pacific Telephone and Telegraph Company, is the successor in interest of the Pacific States Telegraph Company; and that is the successor in interest of the Sunset Telegraph Company, and that is the successor in interest of the Inland Telephone and Telegraph Company, one succeeding the other. That the first company, the Sunset Telephone and Telegraph Company, on September 4, 1897, accepted the provisions of the Acts of Congress of July 24, 1866, entitled an Act to aid in the construction of telegraph lines and secure to the Government the use of the same for the postals, military and other road purposes, by filing the necessary written acceptance; that the Pacific States Telephone & Telegraph Company accepted that in 1907, and then later in the same year, on April 21st, the defendant company accepted the same provisions of the Act by

(Testimony of P. Bacon)

filing its written acceptance in accordance with the terms of the Act. It is also stipulated that the Government mail is carried by contract from Walla Walla to College Place over this road and was being so carried at the time and prior to the time of this accident.

Mr. AVERY: I think we will introduce some proof if it is not already mentioned in order to make our position all right on that theory of the case that your honor has heard discussed, as to the postal roads, that that has always been a post road since its building, that is, mail has been carried over it. If you don't know it yourself I don't ask you to admit it, Mr. Gose.

Mr. GOSE: I don't know, of course, whether mail has been continuously carried over that, but I imagine that for 40 years it has been continuously carried over that road. Now, I could not say that it has. There are times early in the history of the country, of course, that mails came over that road from Wallula to Walla Walla; subsequent to the building of the railroads or prior to the time College Place came into existence, there may have been no mail. I could not say, because I don't know.

P. BACON, a witness called and sworn on behalf of the defendant, testified in part as follows:

DIRECT EXAMINATION.

By Mr. AVERY:

Q. Mr. Bacon, what is your name?

A. P. Bacon.

Q. What has been your occupation?

A. I am with the Telephone Company.

(Testimony of P. Bacon)

Q. What position with the Telephone Company?

A. At the present time?

Q. Yes.

A. I am contract agent, Portland.

Q. And you were in charge up here at the time of this accident, weren't you?

A. I was, yes.

Q. You were out there the next morning and saw the premises?

A. Not the next morning; the following morning.

Q. Well, you had charge generally of placing poles, etc.?

A. I had charge of the maintenance.

Q. The maintenance?

A. The maintenance of way.

Q. And for how long have you directly or indirectly had charge of the placing or changing or maintaining or construction of poles, etc., in this locality?

A. I had direct charge from 1907 until 1911—August of 1907 until April of 1911.

Q. And before then what kind of charge did you have?

A. Several years ago I had charge of all the maintenance of all the toll, toll lines in Oregon and Washington.

Q. This accident happened, I believe, on the 2nd day of April, 1910; taking that date and going back until the time you first had anything to do with it, did the County Commissioners make any request or desire or anything that this—indicate any desire that that line

(Testimony of P. Bacon)

be—in that neighborhood—that guy wire or anything else should be changed?

Mr. GOSE: I object to that question as being incompetent, irrelevant and wholly immaterial. It proves no issue.

(Argument by counsel.)

The COURT: I will sustain the objection. Exception claimed and allowed.

Mr. AVERY: We would like to make an offer, if your honor please, to make proof of the fact that during all of this period prior to the accident since the building of the line and since the existence of the guy wire that the County Commissioners have not objected and they acquiesced in the use of the road as it was used by the company.

The COURT: I will sustain the objection to the offer.

Mr. AVERY: Exception, if your honor please. Exception allowed.

Mr. GOSE: I will offer a further objection that the witness has shown no capacity to qualify.

Mr. AVERY: I will qualify him.

Q. Whose business was it to look after the construction of the telephone lines and the equipment, Mr. Bacon?

A. It was mine.

Q. And who, in fixing your county roads and fixing your county wires and poles, etc., who was the person who made the negotiations, got the right from the County Commissioners?

(Testimony of P. Bacon)

A. Well, I never had to do any of that. All of the holdings were constructed.

Q. Who did the County Commissioners, I will say in this locality, come to when they wanted any of your poles changed?

A. They came to me.

Q. And what is the fact as to whether or not they have in the past—

A. On many occasions they have asked me to move poles, change them around to conform with the road.

Q. And have you heretofore acquiesced in their demands in that respect?

A. Without delay, yes.

Q. Well, is there anyone else that they used to come to?

A. No.

Q. Or anyone else whose business it was to take care of that and receive complaints of that kind?

The COURT: I think you have laid sufficient foundation now.

Mr. AVERY: I will leave that subject with an exception, if your honor please.

The COURT: Yes.

Q. Now, Mr. Bacon, are you a practical pole man; that is, in lines you know how to construct poles, do you?

A. I think so.

Q. How long have you been in the telephone business?

A. About twenty-five years.

(Testimony of P. Bacon)

Q. What is the fact as to whether this particular guy wire—you know the guy wire, of course?

A. Yes.

Q. This particular guy wire was necessary in the position it was to properly sustain the pole to which it was attached?

A. Yes, sir, to keep the pole in an upright position, if it had not been for that line the pole would have leaned over towards the north, and put slack in the wires and the lines.

Q. There is a slight angle in that pole?

A. Yes.

Q. And that was done to overcome that angle?

A. It was absolutely necessary to have some support there, and that is the reason it was done.

Q. Was it any further towards the traveled roadway than was necessary for that purpose?

A. No, it was not. In fact, it was as close to the pole as it was practicable to put it. You could not have gotten it any further away from the traveled portion of the road and have it be of any value.

Q. As a matter of fact, if it had not been for the traveled portion of the road you would have put it further away from the pole?

A. I would.

Q. Do you know that they have constructed a new line?

A. I noticed it the other day, yes.

Q. Did you know that the new poles were five feet longer?

A. I do, yes, sir

(Testimony of P. Bacon)

Q. With those new poles, could they have placed a guy and been practically as it was in the old place?

A. I will just modify that answer. I noticed that the poles are longer; I would not say definitely they are five feet.

Q. All right. I will prove that by someone else. If they were five feet, I will say, taller, higher, would the guy placed at the old place have been sufficient for proper construction?

A. It hardly would, I don't think so.

Q. And it would be necessary to carry it across the street?

A. Well, to have it properly supported it would either that or else put it in the center of the road.

Q. What is that?

A. Either that or else put it in the center of the road.

CROSS-EXAMINATION.

Q. Now the present pole is anchored by an overhead wire reaching across the street?

A. I believe so, yes.

Q. And all you would have to do with this pole would have been to use a pole, a longer pole and guy it across the street?

A. A pole in there could have been guyed across the street.

Q. A pole a few feet longer could have been guyed successfully across the street?

A. Yes.

H. J. PINKHAM, a witness called and sworn on behalf of the defendant, testified in part as follows:

(Testimony of H. J. Pinkham)

DIRECT EXAMINATION.

Q. State your name?

A. H. J. Pinkham.

Q. And what is your occupation?

A. District superintendent of the plant of the Pacific Telephone & Telegraph Company.

Q. Of the defendant in this action?

A. Yes, sir.

Q. And how long have you been in the telephone business?

A. I have been eleven years in the telephone business.

Q. And what are your duties as district superintendent of plants?

A. I have charge of the construction and the maintenance of telephone plants.

Q. You, I suppose, are familiar with this line, the Wallala Road involved in this suit?

A. Yes, sir.

Q. Well now, Mr. Pinkham, what is the character of that line of telephone, and tell whether or not there are telegraph wires on it, and tell all about it?

A. That is what we call a long distance telephone line.

Q. How many service wires does it carry?

A. There are now sixteen long distance wires.

Q. How many were there when you took charge of it?

A. Well, I think—I am not certain exactly how many there were, but I think there were fourteen long distance wires.

(Testimony of H. J. Pinkham)

Q. Do you operate a telegraph system over it?

A. Yes, sir.

Q. And how long has that been running, do you know?

A. Well, we have operated telegraph over that for years, way before April, 1910.

Q. Before the accident?

A. Yes, sir.

Q. What do you mean, it is a regular telegraph line between what points?

A. That is what we call our Portland lead, although some of the wires go to Seattle.

Q. You have Portland telegraphic communications over that wire, and Seattle, and what other places?

A. Telegraph communications between here and Portland and also Walla Walla and Seattle.

Q. Do all of your telephone systems also carry a telegraph system?

A. Not all of the telephone.

Q. Well, I mean between the principal points?

A. Yes, sir.

Q. Such as Spokane, Walla Walla, Tacoma, Seattle, Portland and the larger towns?

A. Yes, sir.

Q. And you have telegraphic instruments and transmit telegraphic and Associated Press news, don't you?

A. Yes, sir.

Q. You were familiar with the condition with the guy and the pole in question as it was immediately re-

(Testimony of H. J. Pinkham)

paired after the accident, you knew the condition, did you not?

A. Yes, sir.

Q. And you knew the location of the wire, the guy wire, and the pole, for instance, as it appears in Defendant's Exhibit No. 2?

A. Yes, sir, I knew it when I first saw it.

Q. Well, that was the way it looked when you first saw it, was it?

A. Yes, sir.

Q. Now, I will ask you, referring not to the boxing, but simply to the question of the pole and the guy wire, and their locations, I will ask you whether or not that is the proper way to guy that pole at that point?

A. It was.

Q. What is the reason for having a guy there at all or not?

A. The reason for the guy wire or the anchor guy was to keep the pole in an erect position.

Q. There is a little bit of an angle there in the elbow, isn't there?

A. There is what we call a pull of about five feet on that pole.

Q. Well, a pull of five feet, does that mean five feet off of a straight line?

A. It is five feet from a straight line drawn between two adjacent poles.

Q. And at that point the line continues across the street and goes on the south side of the road as it goes west from that point, doesn't it?

(Testimony of H. J. Pinkham)

A. Yes, sir.

Q. Could the guy wire have accomplished its purpose if it had been any nearer the pole at that point, if it had been anchored nearer the pole?

A. I will answer that by saying that the closer to the pole the anchor was set that the less efficient would be its power to hold the pole in an erect position.

Q. Now you have raised the entire lead five feet—do you know how high they have raised it?

A. Yes, five feet.

Q. And the poles now have been replaced by five feet longer poles?

A. Yes, and more. Some of them had been reset, and were considerably shorter than thirty feet.

Q. The higher a pole is does it require more space for the guy wire, has to be anchored further away from the pole?

A. It does.

Q. And how have you now fixed it to do the duty on the five foot longer pole at that point?

A. We have extended a guy wire across the street, across the road to a new pole.

Q. Well, is it proper to put one pole up high next to a low pole?

A. It is not.

Q. And you avoid that in proper construction?

A. We do. We aim to get the wires on a level, on a straight line.

Q. Any particular reason for that?

A. If one pole is shorter than the other there is

(Testimony of H. J. Pinkham)
always a tendency for the wires to pull off of a lower pole, pull off the insulator.

Witness excused.

Mr. AVERY: We rest.

Mr. GOSE: It has been agreed between the plaintiffs and the defendant that the photograph which I have in my hand shall be introduced in evidence, and I ask to have it marked Plaintiffs' Exhibit B.

Mr. AVERY: No objection.

THEREUPON said photograph was admitted in evidence and marked PLAINTIFFS' EXHIBIT B, and the same is hereto attached and made a part hereof.

Mr. GOSE: We rest, your honor.

Mr. AVERY: I would like to make a motion, your honor.

The COURT: For the purpose of making your record, is it?

Mr. AVERY: Yes.

The COURT: You can make up your record at any time, dictate such motion as you may desire.

The defendant having rested and the plaintiffs having introduced no further evidence and rested, the defendant in open court renewed its motion made at the close of the plaintiffs' case and again challenged the sufficiency of the evidence on the whole case to warrant a verdict in favor of the plaintiffs and moved the court to take the case from the further consideration of the jury and enter a judgment in favor of the defendant, on the ground that neither in the plaintiffs' case or on the whole case was there evidence or testimony adduced

which would warrant or support a verdict or judgment against the defendant and that on the plaintiffs' case, as well as on the whole case, the testimony and evidence adduced shows as a matter of law that the defendant was entitled to a verdict and a judgment. That said motion was duly argued by the respective parties in open court and was by the court denied, to which ruling the defendant excepted and an exception was allowed. That some of the specific grounds stated in support of the motion, and of the motion made by the defendant at the end of the plaintiffs' case, were that there was not negligence of any kind or character proven against the defendant in respect to the matters and things set forth in the complaints, and that the defendant was lawfully occupying the street or road at the place where the accident involved occurred, and that the plaintiffs, and each of them, were guilty of contributory negligence, even if there was negligence on the part of the defendant, in connection with the matters and things which brought about the damages and injuries described in the respective complaints.

That before the close of the testimony the defendant had duly requested of the court that if said motion for a judgment in favor of the defendant was denied, that he give to the jury the following instructions, each and all of which the court refused to give. To such refusal the defendant, as to each, excepted, and an exception was allowed as to each refusal.

The defendant herein requests the court to instruct the jury as follows:

1.

Under the testimony in this case the plaintiff, Hoffman, is not entitled to recover anything in this action, and your verdict should be for the defendant.

2.

Under the testimony in this case the plaintiff, Morrison, is not entitled to recover anything in this action, and your verdict should be for the defendant.

4.

Under the testimony in this case the plaintiff, Maxfield, is not entitled to recover anything in this action, and your verdict should be for the defendant.

5.

Under the testimony in this case the plaintiffs, Mottett, Davin and Michellod, are not entitled to recover anything in this action, and your verdict should be for the defendant.

6.

From the testimony in this case the defendant and its predecessors in interest had a right to construct and maintain a telephone pole and guy wire at the place where the same were constructed and maintained, and neither of the plaintiffs in this action can recover because of the fact that the pole and guy wire were placed where they were placed.

7.

The defendant is not charged with any negligence in the complaint in this action except that the pole and guy wire were unlawfully constructed in the road, and no allegation or claim of any negligence on the part of the defendant in failing to cover or protect said guy

wire is alleged or claimed in this action, and no verdict for plaintiffs can be based on anything as to the manner of construction or protection of the pole or guy wire.

8.

Under the law the defendant had the right to erect and maintain its poles and appliances for the support thereof in the road mentioned in the pleadings in this case so long as they were erected in a place which did not incommode the public use of the highway. If the guy wire was located at such a place as not to incommode the public use of the highway it would be lawfully located at such place and defendant would not be liable to any one who might be injured by colliding therewith.

11.

If you find from the evidence that the guy wire referred to in the testimony in these cases is located outside of the usually traveled portion of the county road then your verdict should be for the defendant in each case.

12.

Under the law of this state it is prohibited to run an automobile upon a county road at a greater speed than 24 miles per hour, and if the plaintiff, Hoffman, was riding with the driver of the machine and the driver was running at an unlawful and prohibited rate of speed and this fact was known to the plaintiff, Hoffman, and he did not protest against the rate of speed, although having knowledge thereof, he assumed the risk thereof, and if this unlawful speed contributed to the causing of the injury for which said plaintiff, Hoffman, sues, then he cannot recover because he would be guilty of contributory negligence.

13.

Under the law of this state it is prohibited to run an automobile upon a county road at a greater speed than 24 miles per hour, and if the plaintiff, Morrison, was riding with the driver of the machine and the driver was running at an unlawful and prohibited rate of speed and this fact was known to the plaintiff, Morrison, and he did not protest against the rate of speed, although having knowledge thereof, he assumed the risk thereof, and if this unlawful speed contributed to the causing of the injury for which said plaintiff, Morrison, sues, then he cannot recover because he would be guilty of contributory negligence.

Whereupon the court instructed the jury as follows, to-wit:

INSTRUCTIONS:

GENTLEMEN OF THE JURY:

1. Three of these actions have been instituted by the occupants of an automobile to recover damages for personal injuries sustained by them in a collision between the automobile in which they were riding and a guy wire maintained by this defendant within the confines of one of the public roads of Walla Walla county.

2. The three complaints for personal injuries are identical except as to the names of the plaintiffs and the nature of the injuries sustained. In the Morrison case the complaint alleges, first, that the defendant is a corporation organized and existing under the laws of this state, which is not denied; second, that the board of county commissioners have heretofore established a certain public highway within the limits of Walla Walla

county known as the Walla Walla and Wallula road. In regard to this allegation I charge you as a matter of law that the public highway in question has been used for upwards of twenty years and is a public highway in law and in fact under the admitted facts in this case.

3. The third paragraph of the complaint alleges that heretofore said defendant, without authority and contrary to law, set, fixed and established (etc., reading said paragraph).

4. The ensuing paragraphs allege the collision with the guy wire and the injury to the plaintiff.

5. The negligence charged in the complaint is denied by the answer, and in addition the answer sets forth the defense of contributory negligence.

6. Upon these issues I charge you as follows: By Section 9314 of Remington & Ballinger's Codes and Statutes of the state of Washington it is provided that any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway, along or across the right of way of any railroad corporation, and may erect poles, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the railroad or highway or interrupt the navigation of the waters.

7. By this statute there was granted to this defendant company the right to erect and maintain its telephone poles and lines along this public highway, subject

to the condition that they should not be so erected as to incommode the public use of the highway; and if you find from the testimony in this case that these poles were so erected as not to incommode the public use of the highway, then I charge you as a matter of law your verdict must be for the defendant.

8. By Section 8308 of the same Code it is provided among other things that it is a public nuisance to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places.

9. Section 8309 provides that a nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

10. The grant of this right of way to this telephone company, of course, is subject to the limitations contained in the statute. Any person who places a permanent obstruction in a public highway of such a character as to endanger the use of that highway for ordinary public travel commits a nuisance and is liable in damages to any person who is injured by reason of the maintenance of that nuisance without fault on his part.

11. One of the first questions for your consideration therefore will be, did this defendant place an obstruc-

tion in the highway or render it unsafe for public travel? If it did, I charge you as a matter of law that it has committed a nuisance and that it is liable in damages to any person who has suffered injury by reason thereof without fault on his part.

12. If you find from the testimony in this case, that is, from a preponderance of the testimony, that this defendant has maintained a nuisance in this public highway, and that these plaintiffs have been injured thereby, the next question for your consideration will be, did negligence on the part of the plaintiffs themselves contribute to this injury?

13. Upon this issue I will charge you later. The defendant is not charged with any negligence in the complaint in this action except that the pole and guy wire were unlawfully constructed in the road, and no allegation or claim of any negligence on the part of the defendant in failing to cover or protect said guy wire is alleged or claimed in this action, and no verdict for plaintiffs can be based on anything as to the manner of construction or protection of the pole or guy wire. Under the law the defendant has the right to erect its poles and appliances for the support thereof, in the road mentioned in the pleadings in this case, so long as they were erected in a place that did not incommode the public use of the highway. If the guy wire was located at such a place as not to incommode the public use of the highway it would be lawfully located at such place, and the defendant would not be liable to anyone who may be injured by colliding therewith.

14. I further instruct you that under the law negli-

gence on the part of the driver of the automobile mentioned in this case, if the evidence shows any such negligence, cannot be imputed to the plaintiffs, but the plaintiffs are nevertheless responsible for their own negligence. If it appears from the evidence that the plaintiffs or either of them were guilty of any negligence as herein defined in failing to warn the driver of the said automobile to go slower, or in not asking him to stop and permit such plaintiffs to get out, then such failure would constitute contributory negligence and the plaintiffs if guilty thereof can not recover if the same contributed to their injury.

15. If you find from the evidence that the automobile mentioned in this action was driven along the public highway in Walla Walla county at an unlawful speed, and that it was known to the plaintiffs or either of them, that it was being driven at a rate exceeding twenty-four miles an hour, and that to drive the same at the rate of speed it was being driven in the night time was dangerous, and if either plaintiff having this knowledge failed to warn the driver or ask him to stop and permit such plaintiff to get out, if he or they had time and opportunity so to do, then such plaintiffs voluntarily committed themselves to the action of the driver of the automobile, and he is responsible not for the act of the driver but for his own act in failing to take the precautions which under such circumstances he should have taken, and if in addition thereto such rate of speed is shown to have contributed to the accident, then such plaintiff cannot recover in this action.

16. In other words, gentlemen of the jury, the first

question for your consideration is this: Did this defendant maintain a public nuisance in this highway, under the instructions I have given you? If it did, was that nuisance the direct and proximate cause of the injury to these plaintiffs? If so, the next question for your consideration will be, were the plaintiffs guilty of contributory negligence? It was their duty to exercise due and reasonable care for their own safety and protection; that is, that degree of care which you or any other reasonably prudent and careful man would exercise for his own safety or protection under the same circumstances and conditions. If you find from a preponderance of the testimony that they failed to exercise that degree of care, and that such failure on their part contributed to their undoing, then there can be no recovery.

17. The issues in the action brought by the owners of the automobile are substantially the same. They seek here to recover damages sustained by the automobile in the collision with the guy wire.

18. If the defendant was negligent in maintaining the guy wire in the public highway, or if it maintained a nuisance there, and that nuisance was the direct and proximate cause of the injury to the car, the plaintiffs are entitled to recover to the extent of the damage and injury suffered. And I charge you in this connection that the negligence of the driver of the automobile, if any, will not be imputed to the owners of the car.

19. The measure of damages, of course, is the difference between the value of the car before and after the accident.

20. You should not, however, allow the plaintiffs to recover here for any injury suffered by the car in passing over the railroad track, if you find from the testimony that part of the injury to the car was sustained or caused in that way as the defendant here is in no manner responsible for it. It is responsible only for such portion of the injuries as was caused by the col lision with the guy wire.

21. You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses, and you are not bound to believe as true any part of the testimony of any witness, even though such part or such evidence is not directly contradicted, if you find such part of the evidence is so unreasonable or improbable that you do not believe it, taking into consideration all the circumstances and all the other evidence in the case.

22. As I have stated to you, the burden is on the plaintiff to show that the defendant has maintained a nuisance here by a preponderance of the testimony, that is, by the greater weight of the testimony, not necessarily the greater number of witnesses, because you may believe one witness in preference to many if his testimony impresses you as being true. Under ordinary circumstances, however, numbers count in the witness box the same as in the ordinary affairs of life where everything else is equal.

23. The burden of proof is upon the defendant to show that the plaintiffs were guilty of contributory negligence.

You, gentlemen of the jury, as I have stated, are the

sole judges of the facts in this case and of the credibility of the witnesses. In arriving at your verdict you will carefully compare and consider all the testimony. You will observe the demeanor of the witnesses upon the stand, their interest in the result of your verdict, if any such interest is shown, their knowledge of the facts in relation to which they testify, their opportunity for hearing, seeing and knowing those facts, the probability of the truth of their testimony, and all the facts and circumstances given in evidence or surrounding them at the trial.

I will ask you to bring in a separate verdict in each one of the four cases, and I have prepared two forms of verdict in each case, one for the defendant and one for the plaintiff. In case you find for the plaintiff, it will be necessary for you to fill in the amount of damages at which you arrive. This being a federal court all twelve of your number must concur in your verdict whether it be for the plaintiff or for the defendant.

That after the jury had retired to consider of their verdict and before they returned a verdict herein, the defendant excepted to the refusal of the court to instruct as requested, and to the instructions of the court given, as follows, that is to say:

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 1.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 2.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 4.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 5.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 6.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 7.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 8.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 11.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 12.

The defendant excepts to the refusal of the court to give defendant's proposed instruction numbered 13.

The defendant excepts to the giving by the court of the instructions contained in the 8th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 9th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 10th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 11th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 12th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 18th paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 22d paragraph thereof and to each and every part of said instruction.

The defendant excepts to the giving by the court of the instructions contained in the 23d paragraph thereof and to each and every part of said instruction.

That thereafter and on the 6th day of June, 1912, the jury rendered a verdict against the defendant and for the plaintiffs as follows:

For the plaintiff Hoffman, $6000;

For the plaintiff Morrison, $5000;

For the plaintiff Maxfield, $800;

For the plaintiffs Mottett, Davin and Michellod, $500.

And inasmuch as the matters above set forth do not fully appear of record, the defendant tenders this its Bill of Exceptions, and prays that the same may be settled and allowed by the Judge of this court, pursuant to the statute in such case made, and made a part of the record in this case.

SHARPSTEIN & SHARPSTEIN,
POST, AVERY & HIGGINS,
Attorneys for Defendant.

Service of the foregoing accepted by copy this 6th day of July, 1912.

C. C. GOSE,
One of Attorneys for Plaintiffs.

In the United States District Court of the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And also

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

CERTIFICATE TO BILL OF EXCEPTIONS.

The defendant having heretofore and within the time provided by law and the rules of this court, duly and regularly served on the plaintiffs in the above consolidated cases, its proposed Bill of Exceptions in said causes, and the time for proposing amendments thereto by said plaintiffs having expired, and no amendments having been proposed, and said proposed Bill of Exceptions having been duly delivered to the Clerk of this court, and by him duly delivered to the undersigned Judge for settlement, and the Clerk having given due and legal notice to the respective parties, as required by law that said Bill of Exceptions would be settled before the undersigned Judge on this day and at this time thereof, and all parties consenting thereto, and that this order and certification be now and here made,

It is ORDERED that the foregoing Bill of Exceptions hereto annexed, is hereby approved, allowed, settled and certified as a true, full and correct Bill of Exceptions in these consolidated causes. And it is further hereby certified that the same contains all the material evidence, matters and proceedings taken and had upon the trial of said cause, and that all of the exhibits, to-wit: those introduced by the plaintiffs, and marked Plaintiffs' Exhibits "A" and "B" and the exhibits introduced by the defendant, and marked "Defendant's Exhibits 1, 2" and "3", put in evidence on the trial of said cause, and referred to in said Bill of Exceptions and identified, are hereby made and are a part of said Bill of Exceptions, and a part of the record herein, and

are attached hereto. And the said Bill of Exceptions is hereby made a part of the record in said cause.

Done in open court this 4th day of September, A. D., 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Bill of Exceptions.
Filed September 4, 1912.
W. H. HARE, *Clerk.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

E. J. MORRISON,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

CLARENCE E. MAXFIELD,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

And

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ASSIGNMENT OF ERRORS.

The Pacific Telephone & Telegraph Company, a corporation, the defendant in the above entitled causes consolidated, in connection with its petition for a writ of error, makes the following Assignment of Errors which it avers occurred upon the trial of and in connection with said cause, to-wit:

1. The court erred in overruling the defendant's motion (made at the close of plaintiffs' case) to take the cases from the further consideration of the jury and enter judgments for the defendant.

2. The court erred in overruling the defendant's motion (made at the close of all the testimony) to take the cases from the further consideration of the jury and enter judgments for the defendant.

3. The court erred in refusing to allow defendant's witness, Bacon, to answer the following question:

"This accident happened, I believe, on the 2nd day of April, 1910; taking that date and going back until the time you first had anything to do with it, did the

County Commissioners make any request or desire or anything that this—indicate any desire that that line be—in the neighborhood—that guy wire or anything else should be changed?''

4. The court erred in refusing to permit the defendant to prove that during all the period prior to the accidents alleged in the complaints, since the building of the defendant's telegraph and telephone line, and since the existence of the guy wire involved, that the County Commissioners of Walla Walla County had not objected and that they had acquiesced in the use of the road at that point of the accident in the manner that it was used and occupied by the defendant with the pole and guy wire directly involved in this case.

5. The court erred in refusing to give defendant's proposed instruction numbered one to the jury.

6. The court erred in refusing to give defendant's proposed instruction numbered two to the jury.

7. The court erred in refusing to give defendant's proposed instruction numbered four to the jury.

8. The court erred in refusing to give defendant's proposed instruction numbered five to the jury.

9. The court erred in refusing to give defendant's proposed instruction numbered six to the jury.

10. The court erred in refusing to give defendant's proposed instruction numbered seven to the jury.

11. The court erred in refusing to give defendant's proposed instruction numbered eight to the jury.

12. The court erred in refusing to give defendant's proposed instruction numbered eleven to the jury.

13. The court erred in refusing to give defendant's proposed instruction numbered twelve to the jury.

14. The court erred in refusing to give defendant's proposed instruction numbered thirteen to the jury.

15. The court erred in giving to the jury instruction numbered eight.

16. The court erred in giving to the jury instruction numbered nine.

17. The court erred in giving to the jury instruction numbered ten.

18. The court erred in giving to the jury instruction numbered eleven.

19. The court erred in giving to the jury instruction numbered twelve.

20. The court erred in giving to the jury instruction numbered eighteen.

21. The court erred in giving to the jury instruction numbered twenty-two.

22. The court erred in giving to the jury instruction numbered twenty-three.

23. The court erred in overruling defendant's motions for a judgment, notwithstanding the verdicts.

24. The court erred in overruling defendant's motions for a new trial.

25. The court erred in entering judgments herein in favor of plaintiffs, and against defendant.

WHEREFORE, the defendant prays that the judgments herein of the District Court of the United States for the Eastern District of Washington, be reversed and held for naught, and that said District Court be directed

to enter judgments herein as prayed for in the Answers, or that said causes be remanded for further proceedings.

(Signed) POST, AVERY & HIGGINS,
(Signed) F. T. POST,
(Signed) A. G. AVERY,

Attorneys for Defendant.

Endorsements:

Due service of the within Assignment of Errors is hereby admitted, this.....day of September, 1912.

....

Attorneys for Plaintiffs.

Filed September 5, 1912.

W. H. HARE, *Clerk.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

Now comes the Pacific Telephone & Telegraph Company, a corporation, defendant herein, and says that on or about the sixth day of June, 1912, this court entered money judgments in favor of the respective plaintiffs and against the defendant in the above entitled causes consolidated, in which judgments and the proceedings had prior and subsequent thereto in said consolidated causes, certain errors were committed to the prejudice of said defendant, all of which will more fully, in detail, appear in the Assignment of Errors, which is filed with this petition;

WHEREFORE, the said PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation, defendant, prays that a writ of error be issued in its behalf out of the United States Circuit Court of Appeals, in and for the Ninth Circuit of the United States, for the correction of the errors so complained of, and that a transcript of the record, proceedings, papers and exhibits in

said consolidated causes, duly authenticated, may be sent to said United States Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises; that further proceedings be stayed in this court and to that end that the court fix the amount and character of a bond to be required of the defendant to secure such stay until the determination of said writ of error.

(Signed) PACIFIC TELEPHONE & TELEGRAPH CO.,

Defendant.

POST, AVERY & HIGGINS,
F. T. POST, A. G. AVERY.

Attorneys for Defendant.

Endorsements: Due and personal service of the within petition for a Writ of Error is hereby admitted this.....day of September, 1912.

.....

Attorneys for Plaintiff.

Petition for Writ of Error.
Filed September 5, 1912.

W. H. HARE, *Clerk.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And

GEORGE F. MOTTETT, C. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR

On this 5th day of September, 1912, came the defendant above named, Pacific Telephone & Telegraph Company, a corporation, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error presenting therewith an assignment of errors intended to be urged by it; praying also that a transcript of the record, proceedings, papers and exhibits in said consolidated cases, upon which judgments herein were rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as is proper in the premises, and that this court fix the amount and character of a bond to be required of the defendant for the purpose of perfecting a stay of proceedings until said writ of error shall be determined.

In consideration thereof the court does allow the writ of error, provided, however, that the defendant shall file with the Clerk of this court a good and sufficient bond, to be approved by the court, in the sum of fifteen thousand dollars ($15,000), to the effect, that if said defendant, and plaintiff in error, shall prosecute the said writ to that effect, and answer all damages and costs, if it fails to make its plea good, then said obligation to be void, otherwise to remain in full force and effect; upon the filing of said bond all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals.

Done in open court this 5th day of September, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order allowing Writ of Error.

Filed September 5, 1912.

W. H. HARE, *Clerk.*

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To the Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Otto Hoffman, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant; and between E. J. Morrison, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant; and between Clarence E. Maxfield, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant; and between George F. Mottett, S. V. Davin and Xavier E. Michellod, plaintiffs, and The Pacific Telephone and Telegraph Company, a corporation, defendant; said causes being consolidated, a manifest error hath occurred to the great prejudice and damage of the said defendant, The Pacific Telephone and Telegraph Company, as is said and appears by the petition herein, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the party

aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the said City of San Francisco in the State of California in said circuit within thirty (30) days from the date of this writ, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceeding aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done to correct that error, which of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, *Chief Justice of the United States,* this 17th day of September, in the year of our Lord one thousand nine hundred and twelve, (Seal.) and in the one hundred and thirty-seventh year of the Independence of the United States of America.

Attest: W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington.
By FRANK C. NASH,
Deputy Clerk.

The above Writ of Error is hereby allowed.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Endorsements: Service of the foregoing Writ of Error admitted and receipt of a true copy thereof acknowledged this 17th day of September, 1912.

(Signed) T. P. and C. C. GOSE *and*
W. B. MITTON,
Attorneys for Defendants in Error.

Writ of Error (Lodged Copy).
Filed September 17, 1912.
W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

E. J. MORRISON,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

CLARENCE E. MAXFIELD,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.

And

GEORGE F. MOTTETT, C. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, PACIFIC TELEPHONE & TELEGRAPH COMPANY, as principal, and NATIONAL SURETY COMPANY, a corporation, organized and existing under the laws of the State of New York, with its principal office in the City of New York therein, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto OTTO HOFFMAN, E. J. MORRISON, CLARENCE E. MAXFIELD and GEORGE F. MOTTETT, C. V. DAVIN and XAVIER F. MICHELLOD, the above named plaintiffs, in the sum of Fifteen Thousand Dollars ($15,000), to be paid to said plaintiffs, their executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 6th day of September, 1912.

WHEREAS the above named defendant has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judg-

ments in the above entitled consolidated causes, by the District Court of the United States for the Eastern District of Washington, Southern Division,

NOW, THEREFORE, the condition of this obligation is such that if the above named Pacific Telephone & Telegraph Company shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) THE PACIFIC TELEPHONE & TELEGRAPH CO.,
By H. J. TINKHAM,
District Supt. of Plant.
NATIONAL SURITY COMPANY,
By JAMES A. BROWN,
Resident Vice President.

Attest:
By S. A. MITCHELL,
Resident Asst. Secretary.

The foregoing bond is hereby approved.

(Signed) FRANK H. RUDKIN,
Judge.

(Seal.)

Endorsements: Bond on Writ of Error.

Filed September 6, 1912.

W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To Otto Hoffman, E. J. Morrison, Clarence E. Maxfield, George F. Mottett, S. V. Davin and Xavier F. Michellod, plaintiffs, and to Gose & Gose and W. B. Mitton, your attorneys,

GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California in said circuit within thirty (30) days from the date of this citation and writ, pursuant to the writ of error filed in the Clerk's office of the United States District Court for the Eastern District of Washington, wherein The Pacific Telephone and Telegraph Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, *Chief Justice of the United States,* this 17th day of September, in the year of our Lord one thousand nine hundred and twelve, (Seal.) and in the one hundred and thirty-seventh year of the Independence of the United States of America.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Attest:

W. H. HARE,
Clerk U. S. District Court for the Eastern District of Washington.

By FRANK C. NASH, *Deputy Clerk.*

Endorsements: Service of the foregoing Citation admitted and receipt of a true copy thereof acknowledged this 17th day of September, 1912.

(Signed) T. P. and C. C. GOSE *and*
W. B. MITTON,
Attorneys for Defendants in Error.

CITATION (Lodged Copy).
Filed September 17, 1912.
W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.
And
E. J. MORRISON,
Plaintiff,
vs.
THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,
Defendant.
And
CLARENCE E. MAXFIELD,
Plaintiff,
vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

And also

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

WHEREAS it appears that it will be impracticable to have copied the exhibits in the foregoing actions for the record for printing in the Circuit Court of Appeals, where said causes are now pending on a writ of error,

IT IS ORDERED that the original exhibits herein be transmitted to the Court of Appeals with the bill of exceptions instead of copies thereof.

Done in open court this 23rd day of September, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order to transmit original exhibits with printed record.

Filed September 23, 1912.

W. H. HARE, *Clerk.*

By FRANK C. NASH, *Deputy.*

In the United States District Court for the Eastern District of Washington, Southern Division.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

CLARENCE MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And also

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above Court:

Please prepare, print and transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the following record in the above entitled cause, to-wit:

1. Complaints (four).
2. Answers (four).
3. Replies (four).
4. Verdicts (four).
5. Judgments (four).
6. Motion for judgment notwithstanding the verdict.
7. Order denying the same.
8. Motion for a new trial.

8½. Opinion denying motion for new trial, etc.

9. Order denying same.
10. Bill of exceptions.
11. Petition for writ of error.
12. Assignments of error.
13. Order granting writ of error.
14. Bond.
15. Citation.
16. Order permitting motion for new trial, notwithstanding no decision on motion for judgment.
17. Order extending time to file bill of exceptions to July 6th, 1912.
18. Order extending time to file bill of exceptions to July 26th, 1912.
19. Stipulation consolidating cases.
20. Defendant's exhibits 1, 2 and 3, and plaintiffs'

exhibits A and B. (The originals of these are to be sent up and not copies.)

21. Writ of error.
22. Praecipe for transcript of printed record.
23. Order to transmit original exhibits.

POST, AVERY & HIGGINS,
F. T. POST, A. G. AVERY,
Attorneys for Defendant and Plaintiff in Error.

We stipulate that only the foregoing need be printed and sent to the Circuit Court of Appeals.

(Signed) T. P. GOSE and C. C. GOSE *and*
W. B. MITTON,
Attorneys for Defendants in Error.

Endorsements: Praecipe for transcript of printed record.

Filed September 17, 1912.

W. H. HARE, *Clerk.*
By FRANK C. NASH, *Deputy.*

In the District Court of the United States, Eastern District of Washington, Southern Division.

No. 272.

OTTO HOFFMAN,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

No. 271.

E. J. MORRISON,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And

No. 278.

CLARENCE E. MAXFIELD,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

And also

No. 279.

GEORGE F. MOTTETT, S. V. DAVIN and XAVIER F. MICHELLOD,

Plaintiffs,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing printed pages numbered from 1 to 164, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the foregoing entitled consolidated causes as called for by the plaintiff in error in its praecipe as the same appears on page 163 of this printed record, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on Writ of Error from the judgments of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I transmit herewith all the original exhibits on file in the above consolidated cases, pursuant to written order of the court so to do, which order will be found on page 161 of this printed record.

I further certify that I hereto attach and herewith transmit the original Writ of Error and the original Citation issued in said consolidated causes.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of $205.55, and that the said sum has been paid to me by

Messrs. Post, Avery & Higgins, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 5th day of October, 1912.

(Signed) W. H. HARE,

(Seal.) *Clerk.*

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Plaintiff in Error,
vs.
OTTO HOFFMAN,
Defendant in Error,
and
E. J. MORRISON,
Defendant in Error,
and
CLARENCE E. MAXFIELD,
Defendant in Error,
and
GEORGE F. MOTTET, S. V. DAVIN and XAVIER F. MICHELLOD,
Defendants in Error.

CONSOLIDATED.
No. 2192

Error to the United States District Court for the Eastern District of Washington, Southern Division.

BRIEF OF PLAINTIFF IN ERROR

POST, AVERY & HIGGINS,
F. T. POST,
A. G. AVERY,
Spokane, Washington,
Attorneys for Plaintiff in Error.

SHAW & BORDEN CO. 137248

STATEMENT OF THE CASE.

A brief statement of the facts here involved is as follows. On the 2d day of April, 1910, at about nine o'clock in the evening, the plaintiffs, Hoffman, Morrison and Maxfield, accompanied by two other persons, one of whom was the driver of the car, were riding about the city of Walla Walla in an automobile for pleasure, and more particularly on a prominent highway running in a westerly direction from said city. One drink was the most they would admit having taken. They had driven out about —— miles twice and in returning on the second trip they collided with a guy wire slightly less than one-half inch in diameter running from one of the defendant's telephone poles on said road. Inasmuch as the location of this pole and guy wire is the important feature in this case we shall describe it in detail.

The entire distance between the fences which enclosed the land devoted to road purposes was sixty feet. The pole in question was set near the north edge of the road and the guy wire, which supported the pole, extended from the upper portion thereof to a point about nine feet from the north side of the road where it connected with an anchor which secured it on the ground. The central portion of the roadway was macadamized to a width of about eighteen feet, and between the northerly edge of the macadam and the side of the road which was grown up to grass and weeds was a distance of two and one-half feet. The guy wire was anchored as aforesaid thirty-one inches north of the edge of said grass and away from the

center of the road. That is to say, the guy wire was anchored fourteen feet one inch from the center of the traveled part of the road and in the grass thirty-one inches. (Trans. p. 71).

Several photographs were introduced in evidence at the trial (Plffs. Ex. B; Defts. Ex. 2 and 3) and give a fairly accurate idea of the conditions, particularly when examined in connection with the map made by Mr. Baker, one of the defendant's witnesses (Defts. Ex. 1). This map shows that immediately west of the guy wire the road in question was crossed by the railroad diagonally and that in approaching the railroad from the west the automobile was very much off to the left of the road, indeed so much so that both left wheels, according to the plaintiff's testimony (Trans. p. 86) and practically the entire car, according to the defendant's testimony passed over the unprotected railroad ties and rails east of the crossing. The rate of speed at which this crossing was made by the automobile is only to be ascertained by the consequences and the testimony of the plaintiff Hoffman, who said that immediately before the car was going about thirty miles an hour, but that it slowed down and went from the crossing, at least, to a point about twenty feet beyond the wire with the brakes set (Trans. p. 80). The ties were badly slivered. (Trans. pp. 104, 113, 117).

The car, of course, at the time it struck the guy wire, had passed over the railroad and was entirely out of the usual or ever traveled portion of the road, and had been from a point west of the crossing. When

it is noted that the railroad rails and ties made an obstacle six to eight inches high, according to the plaintiffs' witnesses (Trans. p. 79), and ten to twelve inches high, according to the defendant's witnesses (Trans. p. 117), it is not to be wondered that someone was hurt.

None of the plaintiffs testified as to how or where they were thrown from the automobile, consequently that part of the matter is uncertain. But there was testimony adduced to show that when the car was found it was twenty feet beyond the guy wire at right angles with the road, with its front about six feet from the north side thereof, and the guy wire was broken. (Trans. pp. 91, 94).

The several plaintiffs who were injured, and the ones who owned the car, but were not present at the time of the accident, brought several actions for the purpose of recovering damages because of the alleged negligence of the defendant in maintaining said guy wire as above described. The actions were consolidated for trial and further proceedings. On the first trial the jury was unable to agree and upon another trial a verdict was rendered in favor of each of the respective plaintiffs against the defendant, and a judgment was entered thereon, the Court having ruled adversely on the defendant's motion for a judgment notwithstanding the verdict. Defendant's motion for a new trial was overruled and it now prosecutes this writ of error for the purpose of having the cases reviewed by this Court.

ARGUMENT.

I.

We will first call the Court's attention to assignments of error numbered 1, 2, 5, 6, 7, 8, 9, 23 and 25 (Trans. p. 146-8). These assignments go to the question of the defendant's right to a judgment on the case as made.

Section 9314 of R. & B.'s Codes provides:

> "Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: Provided, that when the right of way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city, or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provdied by law: Provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

Under that law the pole and guy wire here involved were lawfully placed if they did not "incommode the public use of the * * * highway." That means, of course, the *reasonable* ordinary use of the highway

and not every *possible* use. The law contemplates, necessarily, that the reasonable ordinary use of the highway by the public does not include the whole thereof and much less does it contemplate that the use referred to is such as is reasonable under *every possible* condition. In other words, the reasonableness is not to be measured by the immediate unusual local facts at any particular time but by the conditions which reasonably appear, as a whole, before that time.

The pole here involved was practically on the north line of the road but an unmanageable horse *could* have drawn a buggy against it, as it could into an ordinary ditch or shade tree and caused damage thereby. An unskillful driver and many other unusual circumstances might bring about a like mishap, but no one would say that such pole, ditch or shade tree incommoded the public use of the road within the meaning of the statute, for its reasonable *ordinary* use did not contemplate that kind of travel nor that it would happen it that particular place. That use at that place would be unusual and extraordinary and was to be reasonably expected *only at the instant before the mishap.*

This guy wire was fourteen feet one inch from the center of the *travelled highway;* therefore, assuming that the tread of a passing wagon is four feet eight inches, this wire was eleven feet nine inches from the nearest side thereof when passing in a manner most usual. We shall not contend that these matters are to be governed by a *precise* measurement, but they must be governed primarily by *distance* from reasona-

bly probable travel. A vehicle then would have to leave the center of the highway eleven feet nine inches in order to collide with this wire under normal conditions. Surely it cannot be said that the defendant did not allow sufficient distance when this wire was placed eleven feet and nine inches from the nearest reasonable *probable* point of interference with vehicle travel, and this statement is emphasized when we consider that the guy was not only fourteen feet one inch from the center of the road, but over two and one-half feet (thirty-one inches) from the nearest *evidence* of *any* travel and nearly twice that distance from the north line of macadam which was eighteen feet wide. This macadam is of course supposed to be sufficiently wide to care for all traffic, including turnouts, hence it cannot be said that a guy wire which is over five feet from it and in an acknowledged untraveled portion of the highway is so placed as to unreasonably incommode the ordinary public use. It is probably unnecessary to add that there is a substantially like space for travel on the other side of the road.

Let us suppose that defendant with a vehicle had stopped at that point with the nearest wheel thirty-one inches inside of the grassy plat and plaintiffs had collided with the standing vehicle after jumping a railroad track, would this Court permit a jury to say that its position incommoded the reasonable public use of the road and that it was therefore liable in damages? Would a pedestrian have been charged with contributory negligence because of being struck at that point by an automobile coming down the grassy plot en-

tirely outside of the traveled road? We think not. Thousands of rural delivery mail boxes, horse-blocks, trees and similar objects are in the highways of this country, much nearer the center of the road than this guy wire but they do not incommode the reasonable ordinary public use.

These highways are not entirely for carriages or automobiles, nor does public use mean that. Part of the public use is for telephone and telegraph lines and for many other purposes unnecessary to name. The automobile has no greater right to incommode the ordinary and reasonable public use in the highways in this state than the defendant company. Neither has a right to incommode the other's reasonable use in the ordinary manner, and we respectfully submit that the jury in this case had no right to find on the facts presented that the defendant's position in the highway "incommoded the public use" thereof, and, because reasonable minds could not differ on the subject, the Court should have decided as a matter of law that the defendant did not maintain a nuisance and was entitled to a judgment.

In considering this phase of the case the particular appearance of the guy wire as placed was not put in issue. That is to say, its *position* only was complained of. Therefore there is no evidence as to whether or not the wire was so covered with boxing or otherwise, as to make it conspicuous to anyone passing. We suggest this feature of the case so that it may not be thought that the Court or the jury could have decided that while its *position* was lawful it was not to be dis-

tinguished by a traveler and therefore became dangerous because of that alone. The issue that was submitted to the jury on this feature of the case was whether an obstruction *in that part of the road* was a nuisance, and if it was the Court said the defendant was liable if no contributory negligence was shown. (Trans. pp. 89, 90, 114, 115 and instruction 13, p. 136). As said by the Court, "Of course as far as this particular case is concerned, I don't think any guard would have been any protection to those parties." (Trans. p. 90).

If the Court and the defendant are in error in the matter of excluding testimony as to the *appearance* of the guy wire in respect to covering and guard and if that feature of the case is of controlling importance, then, of course, only a new trial will give the defendant the opportunity to meet that issue.

Section 5619 of Remington & Ballinger's Codes provides that shade or ornamental trees may be placed on the public highways so long as they are not more than ten feet from the edge thereof on a sixty foot roadway. This wire was one foot inside of such limit and could not possibly occasion more danger to a colliding vehicle than a tree. If it had been a tree with which these plaintiffs collided at the point where the guy wire was anchored, we venture to say that it would be the owner of the tree instead of those in the automobile who would be bringing the action. Again, we suggest that there can be no valid distinction drawn between such trees and this wire, for there is no evidence as to the *appearance* of the wire, nor is there

any evidence that the plaintiffs and the driver did not *see* the wire. If they did or could see the wire, or if seeing it would not (as the Court said) prevent the collision, then its *appearance* was, of course, immaterial.

The case of Bailey v. Bell Telephone Co., 131 N. Y. Supp. is peculiarly in point. The pole complained of in that case was thirteen and one-half feet in from the outside line of the road and two and one-half feet outside the *travelled* roadway. The entire roadway was twenty-four feet wide. The Court said:

> "The highway where the accident occurred was in a rural community, and 24 feet was ample space for those driving over it. The company was not negligent in placing the poles 2 1-2 feet outside the traveled roadway. Scofield v. Town of Poughkeepsie, 122 App. Div. 868, 107 N. Y. Supp. 767, Robert v. Powell, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775, 85 Am. St. Rep. 673."

and

> "However, the real pith of the controversy is whether the telephone company was negligent in erecting this pole 2 1-2 feet north of the traveled part of the roadway, and whether the commissioner was negligent in allowing this to be done. It seems clear there was no invasion of the highway—no improper interference with the use of the road by the traveling public. An unmanageable horse may run into a shade tree, or a lamp post, or stepping stone outside of the roadway, and its driver be injured because of the collision; but negligence may not necessarily be imputed to the town or person directly responsible for placing the obstacle in the highway."

The road here involved is sixty feet wide and the guy about nine feet from the north edge of the roadway.

By clear implication the Supreme Court of Kentucky in Jackson-Hazard Telephone Co. v. Halliday's Admr., 136 S. W. Rep. 135, holds that poles not in the *travelled portion* of the highway cannot be considered as an obstruction and, also, that the interference in order to be unlawful must be with the *ordinary* use. That is to say the pole which interferes with the reasonable use of the road in an ordinary manner is unlawfully placed even though the cause of the collision be extraordinary, but that if the pole is so placed as not to unreasonably incommode the public use in an ordinary manner, it is immaterial what brought about the collision. Reasonable use in the ordinary manner is the only criterion.

In a case where plaintiff who tripped on a guy wire used to support a telephone pole sought to recover damages the Illinois Appellate Court said in Cumberland Tel. & Tel. Co. v. Coats, 100 Ill. App.:

> "The pole and the wire were maintained for a lawful use; they were located clear of the brick sidewalk, and away from the traveled portion of the street, which was used as a driveway. The wire was necessary to hold the pole in its position; there was, so far as the evidence shows, no negligence in its original location. The injury happened, simply by reason of the fact that appellee attempted, in the darkness, to use a portion of the street which had already been taken possession of by appellant, by warrant of right."

See also Johnson v. Bonson, 77 Wis. 146; Wolff v. Dist. Columbia, 196 U. S. 152; Sheffield v. Cent. Union Tel. Co., 36 Fed. 164.

It is the defendant's contention that the facts in the present case are no criterion as to the impropriety of

placing this wire in the position that it occupied at the time of the accident. Giving the greatest possible weight to the plaintiff's evidence, we have them riding in this automobile at the rate of thirty miles an hour just before the crossing was reached. (Trans. pp. 75, 77). They were off from the traveled roadway and on the wrong side thereof for *eastbound* vehicles. They took the railroad crossing so that the left automobile wheels passed in the neighborhood of four feet beyond the crossing proper (Trans. pp. 78, 81, 86, 88) and over the railroad ties and tracks, which were six or eight inches high, with the machine skidding. (Trans. pp. 78, 79). Their speed was so great that Morrison called attention to the railroad tracks, and Maxfield appreciated the situation. (Trans. pp. 74, 82, 83, 84). The conditions were abnormal. The highway was not being used in a reasonable, much less a usual or ordinary manner, The driver "tried awfully hard to make this turn" and it was an "awful heavy turn for a car like that" (Trans. p. 76). Why should the defendant anticipate that any sane travelers in an automobile would, as said by plaintiff Hoffman, go "over the railroad crossing, *over the railroad tracks,* up the *right-of-way?*" Trans. p. 73). These conditions were not to be expected, and the defendant had no reason to anticipate *that* kind of travel when it was placing its guy wire. Although this road is one of the oldest in the state and has been occupied by the telephone line for many years, there is not one scintilla of evidence that a vehicle *ever* before passed within 31 inches of the guy wire. It is preposterous

to say that something is usual or ordinary which never before occurred.

That it was not necessary for the defendant to anticipate anything but the usual and ordinary use of the road by others is well stated in Dignan v. Spokane County, 43 Wash. 419. The county was sued because of having a defective bridge floor which caught the dragging wagon tongue of a wagon behind a runaway team, and occasioned injuries. The Court said:

> "The county is obliged to keep its highways in a reasonably safe condition for ordinary travel only, not so that it may insure protection against its use in an extraordinary or unusual manner. Suppose, for example, that the way was in reasonably safe condition for use in the ordinary methods, and the appellant had designedly let the front end of the wagon tongue slide on the ground, and disaster had resulted, would any one for a moment contend that the county would be liable for injuries caused by the disaster? Certainly not, for the very efficient reason that the appellant did not put the road to the use for which it is intended. Now the fact that the wagon tongue dropped *as the result of accident,* and not of design, does not alter the case. Inasmuch as the county was not responsible for the accident which caused the tongue to drop, or the accident was not such a one as the county was bound to foresee and guard against, the conditions were, as to the county, the same as they would have been had the tongue been dropped designedly; it is liable only in case it failed to keep the highway in a reasonably safe condition *for ordinary travel.*" (Italics ours).

Of course the connection between the guy wire and these injuries is of the most remote character. No one of the plaintiffs gives any testimony as to what

happened after the car struck the railroad. Mullinix testifies that he knows nothing about the accident (Trans. p. 84) and the last that Hoffman knew was that he was passing over the railroad (Trans. p. 79). Where and how these plaintiffs left the car they decline to say. If this ignorance is attributable to the drink they acknowledge to have taken (Trans. p. 84), or to any other fact, they should have so stated, or they should have explained the circumstances of the accident. The jury was allowed to base its verdict on the fact that the guy wire had been struck by the automobile, notwithstanding this Court must know that to go over this unprotected railroad track, acknowledged to be six or eight inches above the ground, at one-third the speed confessed just before the track was struck, would in the majority of cases throw every man from the machine and practically ruin it, and certainly they must have been going at a high rate of speed to have carried the machine, *with the brakes set* at the railroad, twenty or twenty-two feet beyond the guy wire, at right angles with the roadway and with its front wheels about six feet from the north fence. We unhesitatingly assert that the guy wire could not have brought about that result.

It is said that the car struck the wire between the *right* fender and hood, and that the right wheel track went up to the anchor, a little to its right. (Trans. pp. 91, 92). It is a physical impossibility, under those circumstances, for this guy wire to have caused the machine, on such a contact, to swing to the *right* and go twenty feet beyond, at right angles with the road,

and facing north. The effect would have been precisely opposite, if the wire affected at all, substantially, the progress of the car. The breaking of the wire was a mere incident in the flight of this huge car, which broke it as it would have broken a string, and with no more disastrous result *from it.*

We have confined ourselves to the plaintiff's testimony in the foregoing discussion, but that testimony is so meagre and unsatisfactory and suggests conditions so opposed to natural laws, it seems to us that the defendant's testimony may be looked to for explanation. According to their testimony, and particularly that of Mr. Baker, this car was completely off the crossing at the time it struck the railroad track, as shown by well defined marks the next morning, and as illustrated by the map (Defendant's Exhibit 1) made by him. He could find no evidence whatever that the car struck the ground after leaving the railroad, within twenty-five or thirty feet. (Trans. p. 106).

We submit that there is not sufficient testimony that the wire and not the railroad was responsible for the accident. To say that the wire was the cause is not only to speculate but to ignore natural laws. When there are two equally probable causes of an accident of this kind and one of which the defendant is not responsible for, it cannot be made to answer in damages, or in the words of the Supreme Court of the United States in Patton v. Texas & P. R. Co., 179 U. S. 658, 21 Sup. Ct. Rep. 275:

"And where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

See also—

Armstrong v. Cosmopolis, 32 Wash. 110;
Reidhead v. Skagit County, 33 Wash. 174;
Peterson v. Union Iron Works, 48 Wash. 505;
Olmstead v. Hastings Shingle Mfg. Co., 48 Wash. 657;
Stone v. Crewdson, 44 Wash. 691;
Weckter v. G. N. Ry. Co., 54 Wash. 203;
Powers v. Pere Marquette Ry. Co., 143 Mich. 379;
Cincinnati, N. O. & T. P. Ry. v. Johnica's Adm'r. (Ky.), 113 S. W. Rep. 844.

II.

Under assignment of error number 24 we shall discuss such errors as will, if valid, require a new trial in event the defendants are not entitled to a judgment as hereinbefore contended.

Assignments of error numbered 13 and 14 deal with the Court's refusal to give defendant's proposed instructions numbered 12 and 13. (Trans. pp. 132-3).

Sections 2531 and 5571 Remington & Ballinger's Codes prohibit the driving of an automobile outside of cities at a greater rate of speed than twenty-four miles an hour and to do so is declared a misdemeanor with punishment attached.

Proposed instruction 12, which the Court refused to give, is as follows:

> "Under the law of this state it is prohibited to run an automobile upon a county road at a greater speed than 24 miles per hour, and if the plaintiff, Hoffman, was riding with the driver of the machine and the driver was running at an unlawful and prohibited rate of speed and this fact was known to the plaintiff, Hoffman, and he did not protest against the rate of speed, although having knowledge thereof, he assumed the risk thereof, and if this unlawful speed contributed to the causing of the injury for which said plaintiff, Hoffman, sues, then he cannot recover because he would be guilty of contributory negligence."

Proposed instruction 13 also refused is the same, except the word "Morrison" is substituted for "Hoffman."

The only instruction which was given on this particular subject is numbered 15 (Trans. p. 137) and is as follows:

> "If you find from the evidence that the automobile mentioned in this action was driven along the public highway in Walla Walla county at an unlawful speed, and that it was known to the plaintiffs or either of them, that it was being driven at a rate exceeding twenty-four miles an hour, *and that to drive the same at the rate of speed it was being driven in the night time was dangerous,* and if either plaintiff having this knowledye failed to warn the driver or ask him to stop and permit such plaintiff to get out, if he or they had time and opportunity so to do, then such plaintiffs voluntarily committed themselves to the action of the driver of the automobile, and he is responsible not for the act of the driver but for his own act in failing to take the precautions which under such

> circumstances he should have taken, and if in addition thereto such rate of speed is shown to have contributed to the accident, then such plaintiff cannot recover in this action."

The instructions requested should have been given because they state the law, we believe, and the subject is not elsewhere properly covered. The instruction given and last above quoted would have been substantially correct were it not for the insertion of the clause italicised.

Under the instruction given the fact that the plaintiffs, or either of them, knew that the car was being driven at an unlawful rate of speed and in excess of twenty-four miles an hour, and made no protest, was not sufficient to charge them with contributory negligence if the unlawful speed contributed to their injuries, but the Court said in addition to such knowledge, before they could be so charged, these plaintiffs had to know that such prohibited rate of speed was *dangerous* in the *night* time. Under that instruction there was no need for mentioning the fact that the statute prohibited running the car faster than twenty-four miles an hour, or that there was any statute on the subject, for knowledge of that fact by the plaintiffs was, according to the effect of the charge, of no importance if they *thought* that such rate of speed was not dangerous. According to the instructions, notwithstanding the fact that the legislature of the state had declared that speed in excess of twenty-four miles an hour was dangerous, these plaintiffs thought that the legislature was in error, they would have a perfect

right to do so, and thus relieve themselves from the charge of contributory negligence, where the excessive rate of speed contributed to their injuries. In other words, the plaintiffs could repeal the law.

It does not require elaborate argument to demonstrate that the proposed instructions should have been given and that the one substituted did not supply the omission, but was highly prejudicial. If running a car in a manner declared by statute to be unlawful is negligence *per se* or even evidence of negligence, then the Court's action necessitates a reversal of the judgment, and the granting of a new trial.

In passing on this point we again call attention to the fact that Hoffman said the car was going at the rate of thirty miles an hour just before the accident and none of the plaintiffs made any protest. He said the car slowed down, but declined to say how much. It is sufficient to demonstrate, as we have, that the jury could properly find that the speed was in excess of that permitted by law, that plaintiffs made no protest and that such excessive speed contributed to bring about the accident. The Court refused to permit this.

That running a vehicle at a speed prohibited by law is negligence *per se* is held in the following cases:

Engelker v. Seattle El. Co., 50 Wash. 196;
Wilson v. Puget Sound El. R., 52 Wash. 522;
Ballard v. Collins, 63 Wash. 493;
Watts v. Montgomery Traction Co., 57 So. Rep. 471;
Broschart v. Tuttle, 21 Atl. 925;
Harrington v. Los Angeles Ry. Co., 74 Pac. 15;
Weller v. Chicago, 23 S. W. Rep. 1061.

The judgment of the lower Court should be reversed and the cases dismissed and in event that is not done a new trial should be granted.

Respectfully submitted,

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F. T. POST,

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Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Plaintiff in Error,
vs.
OTTO HOFFMAN,
Defendant in Error,
and
E. J. MORRISON,
Defendant in Error,
and
CLARENCE E. MAXFIELD,
Defendant in Error,
and
GEORGE F. MOTTET, S. V. DAVIN and XAVIER F. MICHELLOD,
Defendants in Error.

CONSOLIDATED
No. 2192

Error to the United States District Court for the Eastern District of Washington, Southern Division

BRIEF OF DEFENDANTS IN ERROR

C. C. GOSE and
W. B. MITTEN,
Walla Walla, Washington,
Attorneys for Defendants in Error.

WASHINGTON PRINTING & BOOK MFG. CO., WALLA WALLA

STATEMENT OF THE CASE

On the 2nd day of April, 1910, the plaintiffs Hoffman, Morrison and Maxfield were, by invitation, riding in an automobile along a line of roadway which extended westerly from the City of Walla Walla. The roadway is a public highway sixty feet in width and a portion of said roadway, approximately eighteen feet in width, is macadamized. The highway at the point where the railway crosses the same makes a turn of almost a complete right angle and then proceeds in the same general direction that it had before approaching the railway. This results in creating a relatively short reverse curve over which one has to pass in crossing from one side to the other of the railway track. The planking at the railroad crossing was about twenty-four feet wide. The roadway was graded for the full width of sixty feet. At a short distance east of the railway a telephone pole was situated on the north line of the roadway and a guy wire extended from the telephone pole and was anchored in the highway out into the roadway a distance of nine feet. From the foot of the guy wire to the beaten roadway was thirty-one inches and from the edge of the beaten roadway to the macadam was a distance of two and a half feet. The car in which the plaintiffs were riding approached the railway crossing from the westerly or northerly side of the railway track. The telephone pole and guy wire in question were situated on the easterly or southerly side of the railway track. The car on approaching the railway

track swung to the left hand side of the road and the railway track was crossed by it so as to permit the left wheels of the car to cross the railway track outside of the boarded portion of the crossing. The right wheels crossed on the boarded portion of the crossing. At all times the car was on the graded highway. After crossing the railway track the car was proceeding in a straight line along the graded portion of the highway until it struck the guy wire and was overturned. When the car struck the guy wire it was proceeding in such a direction as would have brought it out, within a distance of a few feet, upon the macadamized portion of the highway. The photographs introduced in evidence and the plat prepared by the witness Dean, afford a very clear illustration of the existing situation. (Plaintiff's Exhibits "A" and "B", Transcript pages 64-72.)

ARGUMENT.

This case is before the Court upon a short record which manifestly does not contain all of the evidence introduced at the trial upon which the jury rendered its verdict. It is to be presumed that the Court did not err in its rulings and that the verdict of the jury is correct. The duty of establishing the error of the Court and the jury rests with the plaintiff in error and upon many of the questions attempted to be raised by plaintiff in error this Court should hold that the failure to produce here all of the evidence in the case, precludes the plaintiff in error from raising any point which involves insufficiency of evidence.

Atchison T. & S. F. R. Co. vs. Myers, 63 F., 793.
Prichard vs. Budd, 76 Fed., 710.
Grand Trunk Ry. Co. vs. Ives, 144 U. S., 408.
Gardiner vs. Schmaelzle, 47 Calif., 588.

The trial Court, with all of the evidence before it, said in the course of the opinion rendered in the case: "The sole question, therefore, bearing on the sufficiency of the evidence to sustain the verdict, is the single one, did the guy wire in question incommode the public use of the highway and was that the proximate cause of the accident?" (Trans. p. 52).

And again, "Whether the defendant was guilty of negligence in failing to maintain its poles in a safe condition, under all the circumstances, was a question of fact for the jury. The question of negligence may be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which may be drawn from conceded facts."

Pac. Tel. & Tel. Co. vs. Parmeter, 170 Fed., 140.

The Court throughout its opinion treats as worthy of consideration, the single question of the negligence of defendant. The Court evidently did not think that the question of the contributory negligence of the defendants in error, as a matter of law, in the light of the evidence, before the jury was worthy of any consideration. The motion for a new

trial seems to center in the mind of the court, around the question of the location of the guy wire and the short record presented here, seems peculiarly to have had the same purpose in view. Short as the record is, it is utterly devoid of any matter which entitles this Court to say, as a matter of law, that the question of contributory negligence should not have gone to the jury. The record also discloses that on the question of the contributary negligence of the defendants in error, no instruction was requested by plaintiff in error and it took no exception to the instructions of the Court upon this question. It is at once apparent that plaintiff in error had practically abandoned its defense of contributory negligence before the case went to the jury.

The trial Court says in its opinion in the case that but two questions are involved "First, error of the Court in excluding the testimony tending to show that the officers of Walla Walla County were aware of the location of the guy wire in question prior to the happening of the accident complained of, and, second, insufficiency of the evidence to justify the verdict. The latter of course, is the sole ground of the motion for judgment notwithstanding the verdict." (Trans. p. 51).

If the trial Court is correct in its statement, the question of the contributory negligence of defendants in error, was clearly abandoned. The evidence however, nowhere shows that defendants in error were guilty of contributory negligence. On

the other hand it is apparent that the acts of defendants were such as to require the question of contributory negligence to be left to the jury.

Defendants in error were riding in an automobile as the invited guests of the driver. They had a right to rely upon him in the management of the car. To what extent they might rely upon him was peculiarly a question for the jury under the circumstances as detailed by the witnesses. There is nothing in the evidence to show that at any time, or under any circumstance did any of the defendants in error act toward the driver in any way other than reasonably prudent man would have acted under the circumstances. It is the common experience that a guest riding in a car hesitates to interfere with the management of the car on the part of the driver and it is equally a matter of common experience that suggestions to, or interference with the driver are as likely to prove harmful as beneficial.

As the car approached the crossing one of the occupants did, however, caution the driver in regard to the railroad. (Trans. pp. 82-83).

The defendants in error had ridden down the road to a point one-half mile beyond the railway crossing where they turned around and started back up the roadway. What ever their speed might have been it is apparent that its rate was all included within this one-half mile of travel. (Trans. pp. 67-73). The machine slowed up on passing a buggy about two hundred yards before reaching the

crossing. (Trans. p. 74). He slacked up twice, before and after he passed the buggy. (Trans. p. 74). Just before reaching the railway track the car was in the center of the street. (Trans. p. 76). Some rain had fallen and the road was wet. (Trans. p. 80). The car was a heavy one, weighing almost two tons. (Trans. p. 76). The wheels of the car had a diameter of forty-two inches. (Trans. p. 92). By reason of the wet condition of the roadway the car skidded somewhat and approached the outer edge of the roadway. At all times the right wheels were on the macadamized road. (Trans. pp. 86-87-88). As the car passed over the railway track there was a slight jar. (Trans. p. 79). The car hit the guy wire and upset. (Trans. p. 73). The car was traveling straight up the roadway when it struck the guy wire. (Trans. pp. 80-81).

It becomes clearly evident in the light of citations of evidence that the question of contributory negligence was one solely for the determination of the jury. We submit that the arguments offered by plaintiff in error in its brief, on the question of contributory negligence, are arguments properly to be addressed to a jury and of themselves show that the question of contributory negligence was properly submitted to the jury and that its determination of this question is final.

On pages 8 and 9 of the brief of plaintiff in error some discussion is made in regard to the guy wire and on page 9 of the brief it is stated, "If the

Court and the defendants are in error in the matter of excluding testimony as to the appearance of the guy wire in respect to covering and guard, and if that feature of the case is of controlling importance, then, of course, only a new trial would give the defendants an opportunity to meet that issue."

It is difficult to see wherein this becomes a point involved in this case. Plaintiffs in error never sought to show the appearance of the guy wire or whether there was any boxing around it. Defendants in error did seek to show that there was no boxing or guarding around the guy wire at the time of the injury. A witness for defendants in error testified that the guy wire was composed of five or six wires and the guy wire had a diameter less than a half of an inch. He was then asked: "What guarding, if any, was put around it?" To this question plaintiff in error interposed the following objection: "We object, if the Court pleases, on the ground that there is no charge of any neglect in the construction of the wire, or its arrangement, the mere charge being that it was put in the road at all." (Trans. p. 89). Plaintiff in error cannot complain of the lack of any evidence in this particular since the Court excluded it upon its own objection.

In order that the Court may secure a proper appreciation of the situation of the guy wire complained of and its relative relation to the roadway and the railroad crossing which the respondents were approaching in the car along the roadway from

a point across the railroad crossing opposite the guy wire, we ask the Court to carefully observe plaintiffs exhibits "A" and "B" which show in detail the surrounding conditions. The Court will observe that defendants in error were approaching the railroad crossing which crosses the roadway at a point where the roadway forms a reverse curve, and that the car approaching it a short distance below the railway crossing would be in direct line with the guy wire extending into the highway. The location of the guy wire as it is portrayed in these exhibits evidences a physical fact to which but little value can be added by any argument of counsel. Admittedly it reaches to a point within thirty-one inches of the beaten roadway and is anchored in the ground at this point. It is also admitted that the guy wire extends a distance of nine feet from the north line of the roadway out into the roadway. It is also clear from the evidence that the roadway is graded to its full width of sixty feet. It is also clear from the evidence that the guy wire is anchored within two and one-half feet of the macadamed part of the roadway and that the macadam has a width of eighteen feet. (Trans. pp. 64-70).

The Court will observe that the macadam is constructed on the roadway near its northerly side; that the portion of the roadway which the public is particularly invited to travel lies on the northerly side of the roadway and in direct proximity with the guy wire.

The statutes of the State of Washington provide: "Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters."

Bal. Code of the State of Wash., Sec. 4369.

A consideration of the cases hereinafter cited will disclose some variety in the language of the statutes of the various states but we believe that all of the statutes so far as they involve the obligation due from a telephone company erecting its poles within the street, to travelers upon the public highway have the same end in view and are essentially subject to the same construction. We think it is clear that nothing except a most extraordinary situation will authorize a Court to take away from the jury the question as to whether a company has so constructed its line as to meet the requirements of the statutes. We also submit to the Court that no case involving the question herein discussed appears in any of the authorities which so clearly entitled

them to be resolved by the jury as does the case at bar.

The nearness of the guy wire to the traveled roadway, the fact that the roadway was graded for a distance of nine feet between the foot of the guy wire and the pole to which it was attached, the near approach to the guy wire of the macadamed portion of the highway, and the peculiar situation created by the reverse curve extending across the railroad track all unite in making the resolution of the question peculiarly one within the province of a jury.

We are unable to see how the jury could have resolved this question in any other manner, and it should be patent to the Court and jury alike that the guy wire was so placed as to incommode the public use of the highway. Placed as the guy wire was it stood out as an active and continuous menace to the reasonable use of the highway by travelers. It would seem that no one could observe its location without being impressed that it was highly dangerous to public travel and that it was placed in utter disregard of the provisions of the statute. It would seem that such a guy wire would clearly be a menace to public travel even if it were placed on a straight line of roadway. Its particular location at the very border of the reverse curve made it doubly a menace to the safety of the traveling public. The nearness of the macadamed portion of the roadway added to the seriousness of this menace. It is also clear from the testimony that no reasonable necessity existed

for the placing of the guy wire in the position complained of. All that was needed was a higher pole with an overhead guy wire across the roadway. (Trans. p. 124).

We believe the Court will recognize however, that all of the argument suggested as well as all of the argument appearing in the brief of appellants, is such as may be properly offered to the jury and that the arguments most clearly establish the proposition that the question involved was one for the determination of the jury and not of this Court. The evidence clearly establishes a case which is entitled to be left to the determination of the jury.

Bentley vs. Missouri & Kansas Telephone Co., 125 S. W., 533.

City of Fortworth vs. Williams, 119 SW., 137.

Southern Texas Tel. Co. vs. Tabb, 114 SW., 448.

Chant vs. Clinton Tel. Co., 110 NW., 423.

Texas Telegraph & Telephone Co. vs. Thompson, 130 SW., 705.

Alice, Wade City & C. C. Tel. Co. vs. Billingsley, 77 SW., 255.

Davidson vs. Utah Independent Tel. Co., 97 Pac., 124.

Bevis vs. Vanceburg Tel. Co., 89 SW., 126.

Pac. Telephone & Telegraph Co. vs. Parmeter. 170 Fed., 140.

Little vs. Central Dist. & Printing Tel. Co., 62 A., 848.

Wilson vs. Great Southern Telephone & Telegraph Co., 6 So., 781.

Louisville Home Tel. Co. vs. Gaspar, 93 SW., 1057.

Wolfe vs. Erie Tel. & Tel. Co., 33 Fed., 320.

North Atlantic Telephone Co. et al. v. Peters, 148 S. W. 273;

Cynthia Telephone Co. v. Asbury, 143 S. W. 1050;

Snee vs. Clear Lake Tel. Co., 123 NW., 729.
Linden vs. Livingston Electric Light Co., 41 Pac., 995.

The rule announced in these cases which recognizes that the question involved is one to be determined by the jury is in direct recognition of the general rule established in the State of Washington. This rule is clearly evidenced in the decision of the Supreme Court of the State of Washington in the case of Blankenship vs. King County, (68 Wash. 84). In this case the Court holds that granite blocks placed by a citizen on the graded part of a highway and outside of the macadamized part, may constitute such an obstruction to travel as to entitle one who is injured by coming in contact with them while traveling on the highway, to recover damages. The obstruction complained of in this case was but little nearer to the macadamized portion of the roadway than was the guy wire in question and there is nothing to show such an aggravating surrounding condition as in the case at bar.

The telephone company is subject to any reasonable regulation of the State lying within its police power and cannot under any circumstances use the public highway so as to incommode public travel.

Western Union Tel. Co. vs. City of Richmond, 224 U. S., 160.

It is clear that without regard to the question as to whether the driver of the car was guilty of contributory negligence or not, the defendants in error, Mottet, Davin and Michellod, are entitled to recover.

N. Y. Electric Ry. Co. vs. New York, Lake Erie & Western Ry. Co., 43 L. R. A., 849.

Thompson on Negligence, Sec. 512.

Sea Insurance Co. of Liverpool, England, et al vs. Vicksburg S. & P. Ry. Co., 159 F. 676.

Gibson vs. Bessemer and Lake Erie R. R. Co., 27 L. R. A. (N. S.), 689.

Currie vs. Consolidated R. Co., 71 A., 356.

We therefore submit that the judgments of the lower Court in all the cases should be affirmed.

Respectfully submitted,

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Attorneys for Defendants in Error.